CASE LAW ON EVIDENCE IN CIVIL MATTERS

PART-I

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SC & HC JUDGEMENTS

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CHAPTER-1

ADMISSIBILITY AND OBJECTIONS

OBJECTIONS OF DEFENDANT

Brij Prakash Gupta vs. Ashwini Kumar: MANU/DE/0469/2020 - Objections of Defendant should be recorded prior to or during cross-examination and same should be considered at time of final adjudication - Objections as to mode of proof, admissibility, etc., if raised, would also be liable to be adjudicated at final stage.

OBJECTIONS AS TO DOCUMENT MARKING AND AS TO ITS MODE OF PROOF

MANU/SC/0798/2003 : (2003) 8 SCC 752 - R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami & V.P. Temple & Anr.; It was held therein that objections that the document sought to be proved is itself inadmissible can be raised even after the document has been marked as an exhibit or even in appeal or revision, but objections directed not against the admissibility of the document but against the mode of proof thereof on the ground of irregularity or insufficiency can be raised when the evidence is tendered but

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not after the document has been admitted in evidence and marked as an exhibit.

OBJECTION TO DOCUMENT SHOULD BE RAISED BEFORE MARKING OF DOCUMENT

R.V.E. Venkatachala Gounder vs. Arulmigu Viswesaraswami and V.P. Temple and Ors.: MANU/SC/0798/2003 - Order 13 Rule 4 of the CPC provides for every document admitted in evidence in the suit being endorsed by or on behalf of the Court, which endorsement signed or initialed by the Judge amounts to admission of the document in evidence. An objection to the admissibility of the document should be raised before such endorsement is made and the Court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend me document being endorsed as admitted or not admitted in evidence. In the latter case, the document may be returned by the Court to the person from whose custody it was produced.

FAILURE TO RAISE A PROMPT AND TIMELY OBJECTION AMOUNTS TO WAIVER OF THE NECESSITY FOR INSISTING ON FORMAL PROOF OF A DOCUMENT

Court in R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Another reported in [(2003) 8 SCC 752] to which one of us, Bhan, J., was a party vide para 20: "20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence

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should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."

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To the same effect is the judgment of the Privy Council in the case of Gopal Das & Anr. v. Sri Thakurji & Ors. reported in [AIR 1943 PC 83], in which it has been held that when the objection to the mode of proof is not taken, the party cannot lie by until the case comes before a Court of appeal and then complain for the first time of the mode of proof. That when the objection to be taken is not that the document is in itself inadmissible but that the mode of proof was irregular, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. Similarly, in Sarkar on Evidence, 15th Edition, page 1084, it has been stated that where copies of the documents are admitted without objection in the trial Court, no objection to their admissibility can be taken afterwards in the court of appeal. When a party gives in evidence a certified copy, without proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of admission and such objection will not be allowed at a later stage.

Court in Smt. Gangabai v. Smt. Chhabubai (AIR 1982 SC 20) and Ishwar Dass Jain (dead) thr.Lrs. v. Sohan Lal (dead) by Lrs.(AIR 2000 SC 426) with reference to Section 92(1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.

It is impermissible for the Defendant to lead oral evidence which contradicts what is stated in the documents which admittedly were executed by the Defendant. Reliance is placed on the decisions in Roop Kumar v. Mohan Thedani AIR 2003 SC 2418; Gurdial Singh v. Raj Kumar Aneja (2002) 2 SCC 445

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WHEN OBJECTION AS TO MARKING OF DOCUMENT RAISED PROPER PROCEDURE TO FOLLOW

Hon'ble Supreme Court in the case of Bipin Shantilal Panchal v. State of Gujarat and Anr. AIR 2001 SC 1158 : (2001)3 SCC 1 : 2001. Cri. L.J. 1254 (SC), wherein, it is observed as under.-

"12. It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the Court does not proceed further without passing order on such objection. But, the fall out of the above practice is this: Suppose the Trial Court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the Appellate or the Revisional Court, when the same question is recanvassed, could take a different view on the admissibility of that material in such cases the Appellate Court would be deprived of the benefit of that evidence, because that was not put on record by the Trial Court. In such a situation the higher Court may have to send the case back to the Trial Court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or re-moulded to give way for better substitutes which would help acceleration of trial proceedings.

13. When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the Trial Court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If

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the Court finds at the final stage that the objection so raised is sustainable the Judge or Magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. However, we make it clear that if the objection relates to deficiency of stamp duty of a document the Court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.

14. The above procedure, if followed, will have two advantages. First is that the time in the Trial Court, during evidence taking stage, would not be wasted on account of raising such objections and the Court can continue to examine the witnesses. The witnesses need not wait for long hours, if not days. Second is that the superior Court, when the same objection is re-canvassed and reconsidered in appeal or revision against the final judgment of the Trial Court, can determine the correctness of the view taken by the Trial Court regarding that objection, without bothering to remit the case to the Trial Court again for fresh disposal. We may also point out that this measure would not cause any prejudice to the parties to the litigation and would not add to their misery or expenses.

15. We, therefore, make the above as a procedure to be followed by the Trial Courts whenever an objection is raised regarding the admissibility of any material or any item of oral evidence".

ADMISSIBILITY OF A DOCUMENT

R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Another reported in [(2003) 8 SCC 752] "20. The learned counsel for the defendant-respondent has relied on Roman Catholic Mission v. State of Madras [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case

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which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in

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evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."

In a decision reported in **Bipin Shantilal Panchal vs. State of Gujarat and another (2001 (3) SCC 1),** the Apex Court was pleased to consider the delay in disposal of a criminal case, where the Trial Court disallowed the objections of admissibility of certain documents, It is an archaic practice that during the evidence collecting stage, whenever any objection is raised regarding admissibility of any material in evidence the court does not proceed further without passing order on such objection. But the fall out of the above practice is this: Suppose the trial court, in a case, upholds a particular objection and excludes the material from being admitted in evidence and then proceeds with the trial and disposes of the case finally. If the appellate or revisional court, when the same question is re-canvassed, could take a different view on the admissibility of that material in such cases the appellate court would be deprived of the benefit of that evidence, because that was not put on record by the trial court. In such a situation the higher court may have to send the case back to the trial court for recording that evidence and then to dispose of the case afresh. Why should the trial prolong like that unnecessarily on account of practices created by ourselves. Such practices, when realised through the course of long period to be hindrances which impede steady and swift progress of trial proceedings, must be recast or re-moulded to give way for better substitutes which would help acceleration of trial proceedings. .... When so recast, the practice which can be a better substitute is this: Whenever an objection is raised during evidence taking stage regarding the admissibility of any material or item of oral evidence the trial court can make a note of such objection and mark the objected document tentatively as an exhibit in the case (or record the objected part of the oral evidence) subject to such objections to be decided at the last stage in the final judgment. If the court finds at the final stage that the objection so raised is sustainable the judge or magistrate can keep such evidence excluded from consideration. In our view there is no illegality in adopting such a course. (However, we make it clear that if the objection relates to

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deficiency of stamp duty of a document the court has to decide the objection before proceeding further. For all other objections the procedure suggested above can be followed.)

In **State of Bihar and Ors. v. Sri Radha Krishna Singh & Ors., AIR 1983 SC 684**, Court considered the issue in respect of admissibility of documents or contents thereof and held as under: "Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil."

In Madan Mohan Singh & Ors. v. Rajni Kant & Anr., AIR 2010 SC 2933, Court examined a case as a court of fifth instance. The statutory authorities and the High Court has determined the issues taking into consideration a large number of documents including electoral rolls and school leaving certificates and held that such documents were admissible in evidence. The Court examined the documents and contents thereof and reached the conclusion that if the contents of the said documents are examined making mere arithmetical exercise it would lead not only to improbabilities and impossibilities but also to absurdity.

Ketharaju Rajeshwari vs. Kanthamraju Varalakshmamma and Ors. MANU/AP/0113/1964

Is the certified copy of the settlement deed given by the Registrar's Office admissible to prove the execution of the settlement deed? I do cot think it can be seriously disputed that the certified copy although admissible in evidence as secondary evidence may be enough to prove the contents of the document, but is not enough to prove its execution. Subba Rao, C. J., as he then was, in Padmanabhachari v. Sithapathi Kao (1954) 2 MLJ 75 observed that "the certified copy of the suit mortgage bond is admissible in evidence, but this will not dispense with the proof of the execution of the same."

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It cannot however be contended that the certified copy is not admissible in evidence to prove even the contents of the document. Section 66 of the Evidence Act embodies the general rule that the contents of the documents may be proved either by primary or secondary evidence. The terms "primary' and "secondary evidence" have been explained in Sections 62 and 63. It is Section 64 which lays down that documents must be proved by primary evidence except in the cases where secondary evidence is permitted under the Evidence Act. This section rests on the maxim that the 'best evidence' must always be produced. But when it is proved the original is either lost, or has been wilfully suppressed or cannot be produced for reasons beyond the control of the plaintiff, secondary evidence can certainly be looked into.

Now under Section 65 secondary evidence may be given of the existence, condition or contents of a document when the original is a public document within the meaning of Section 74. Section 74 defines what are public documents. Subsection (2) of Section 74 States that public records kept in any State of private documents are also public documents. This Section therefore refers to such records also as are kept under the Indian Registration Act, particularly Sections 51 and 57-Section 51 refers to the register-books to be kept in the several registration offices. Under Section 57 registering officers are under a legal obligation to allow inspection of certain books and indexes, and to give certified copies of entries. Under Sub-section (5) of Section 57 all copies given under the said Section are to be signed and sealed by the registering officer. These certified copies shall be admissible for the purposes of proving the contents of the original document.

Under Section 77 of the Evidence Act also certified copies are admissible to prove the contents of the public documents. There is however some difference between Section 57 of the Registration Act and Section 77 of the Evidence Act. Whereas Section 57 of the Registration Act makes the certified copies admissible to prove the contents of the original' documents. Section" 77 of the Evidence

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Act makes the certified copies admissible to prove the contents of the public documents. This difference does not alter the effect as far as this case is concerned. This Section i.e., Section 57, therefore, permits a certified copy to be used for the purposes of proving the contents of the original document. Similarly under Section 60(2) of the Registration Act a certificate containing the word. 'registered' together with the number and page of the book in which the document has been copied-shall be signed and sealed and dated by the registering officer. This certificate under Section 60(2) is admissible for the purpose of proving that the document has been duly registered in the manner provided by this Act and that the facts mentioned in the endorsement referred to in Section 59 have occurred as therein mentioned.

Although therefore a mere registration of a document may not by itself constitute sufficient proof of the execution of the document, but in view of Sections 57 and 60 of the Registration Act the-certified copy and the certificate issued by the Registrar, do, in my judgment, constitute sufficient evidence to prove the contents of the document and also to some extent an evidence of the execution of the document. It may be that proof of admission of execution before the Registrar may not satisfy completely the requirements of Section 67 of the Evidence Act which requires that the signature of the executant must be proved to be in his handwriting. But it cannot be argued that admission of signature before the Registrar cannot in any case form an evidence of the execution of the document It may be argued validly that merely on the basis of admission before the Registrar it may be dangerous to declare the execution of the document as proved, but certainly if there is other corroborating evidence the admission of execution before the Registrar can be a relevant piece of evidence from which presumption of execution can legitimately be drawn. After all the solemnity of the registration of a document cannot be lost sight of. The statutory inference which gives rise from the solemnity of the registration, cannot be, therefore, ignored,

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A combined reading of Sections 57 and 60 of the Registration Act and Section 67 of the Evidence Act lead me to the conclusion that mere production of a certified copy of a document registered may not be enough to prove the execution of the document. But it is sufficient to prove the contents of the document. A certificate issued by the Registrar under Section 60 is acceptable in evidence to prove to some extent the admission of execution made by the executor before the Registrar. It may be that an imposter approached the Registrar and got the registration made, but no such allegation is made in this case. It is not even suggested to any one in the witness box. It would therefore not be correct to say that the admission of signature before the Registrar by Lingiah does not even constitute a relevant piece of evidence which can legitimately be taken into consideration along with the other evidence in the case. In this case apart from the certified copy and the certificate of registration in which Lingiah admits the execution of the settlement deed, there are two witnesses who say that Venkayamma admitted before them that she is permitted to have the usufruct of the suit property during her life-time and that after her death the property will revert to Lingaiah or his family. I am not therefore prepared to agree with the submission made by the learned Counsel for the appellant that in this case apart from the certified copy there is no other evidence of the execution of the settlement deed.

ADMISSIBILITY OF UNREGISTERED PARTITION DEED

Siromani v. Hemkumar, A.I.R.1968 S.C.1299: Of course, the document is admissible to prove an intention on the part of the coparceners to become divided in status; in other words, to prove that the parties ceased to be joint from the date of the instrument . .

Roshan Singh v. Zile Singh, A.I.R.1988 S.C.881 : It is well-settled that the document though unregistered can however be

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looked into for the limited purpose of establishing a severance in status, though that severance would ultimately affect the nature of the possession held by the members of the separated family co-tenants. . . . .

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CHAPTER-2

CHIEF EXAMINATION AND AFFIDAVIT

EXAMINATION IN CHIEF WHEN IT FORMS PART OF EVIDENCE

Ameer Trading Corpn. Ltd. v. Shapoorji Data Processing Ltd., MANU/SC/0943/2003 : (2004) 1 Supreme Court Cases 702 considered Rules 4 and 5 of Order XVIII of the CPC and agreed with the Bombay High Court's harmonious reading of the two provisions in F.D.C. Ltd. v. Federation of Medical Representatives Assn. India (FMRAI) & Ors., MANU/MH/0038/2003 : AIR 2003 Bom 371. The Bombay High Court, in F.D.C. Ltd. (supra), held that in the case of appealable orders the examination-in-chief may be filed by way of an affidavit, however, the same would not form part of the evidence until and unless the deponent appears before the Court and confirms the contents of the affidavit. The Supreme Court, however, further observed as under: "33. The matter may be considered from another angle. Presence of a party during examination-in-chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the court in writing and in any event, the attention of the witness can always be drawn while cross-examining him. The defendant would not be prejudiced in any manner whatsoever if the examination-in-chief is taken on an affidavit and in the event he desires to cross-examine the said witness he would be permitted to do so in the open court. There may be cases where a party may not feel the necessity of cross-examining a witness, examined on behalf of the other side. The time of the court would not be wasted in examining such witness in open court."

WHEN AFFIDAVIT CONTAINS AVERMENTS BEYOND PLEADINGS

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Bombay High Court in Rajendra Singh Chhatrasal Singh Kushwaha (Deceased) v. Jitendra Singh Rajendra Singh Kushwaha, MANU/MH/1904/2013 : (2013) (6) Mh. L.J. 802, "42. In my view, the affidavits permitted to be filed under Order 18 Rule 4 in lieu of examination-in-chief has to contain only the deposition which is relevant facts in issue in the suit or relevant aspects which the witness has to prove before the Court and not beyond what is pleaded by the parties and also not which is irrelevant to the issues framed. If an opposite party raises any objection about any part of the deposition which is totally irrelevant, beyond the pleadings and/or the same is irrelevant ex facie, Court can direct the deponent to file fresh affidavit after deleting the irrelevant part of evidence or can ignore such irrelevant part of evidence on which no cross-examination could be warranted."

AFFIDAVIT CONTAINS FACTS IN PLEADINGS AND EVIDENCE RELATED TO IT

In Ramesh Kumar Arora v. Bhola Nath & Ors., MANU/DE/3951/2011 : 2011 (125) DRJ 356 a ld. Single Judge of Delhi High Court has held:

"18. A perusal of the aforesaid Rule (4) of Order 18 shows that the purpose of conducting the examination in chief by way of affidavit is to cut short the delay in the recording of the evidence of the parties, as deciding the objection at that stage only causes delay in the disposal of the suit itself.

19. It may be pertinent here to refer to the portion which has been highlighted in the aforesaid Rule which clearly mandates that if a party has any objection then such an objection can be got recorded before the Local Commissioner and the question can be decided ultimately by the Court at the stage of final argument. The whole purpose and the scheme of the aforesaid order is to ensure that there is minimum loss of time in recording the evidence of the parties as it cause incalculable delay in the disposal of the suit.

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20. In the instant case also, I feel that since the learned Local Commissioner who had been appointed was an experienced and seasoned Retired Additional District Judge and if at all there was any averment made in the affidavit by the petitioner which was beyond pleadings to which the defendants/applicants had any objection, the same could be taken by him before the learned Local Commissioner and got recorded rather than filing the present application.

21. I fully agree with the contention of the learned senior counsel for the defendants that as a matter of law, a fact which is not pleaded cannot be proved and therefore, evidence has to be confined only with regard to the facts which are pleaded but at the same time, it is not necessary that in the plaint while pleading the facts, the evidence with regard to the same be also averred. It is also correct that under the Evidence Act, 1872 a party who is to adduce evidence is given liberty not only to produce evidence with regard to the 'fact in issue' which is involved in the case but it is also permitted to adduce evidence with regard to the relevant facts provided, they are admissible under Section 5 to 55 of the Evidence Act which clearly lays down the parameters within which a fact must fall and only then it can said to be a relevant fact.

22. It may be pertinent here to mention that a fact may be relevant but still it may not be admissible. "

AFFIDAVIT SHOULD CONTAIN FACTS WHICH ARE TO THE PERSONAL KNOWLEDGE OF THE DEPONENT

Brij Praksh Gupta vs. Ashwini Kumar: MANU/DE/0469/2020

- In daily practice, it is noticed that the affidavits in evidence are a 'cut and paste' from the plaint, which is not how they are supposed to be. The affidavit should contain facts which are to the personal knowledge of the deponent and the same cannot be a verbatim copy of the plaint. The affidavit in evidence can factually expand on a plea taken in the plaint, it can also support factual assertions made in the plaint but it cannot contradict or state facts which cannot be derived from the plaint. The practice of filing

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affidavits in evidence which replicate the plaint is incorrect and ought not to be permitted by Courts.

legal position on affidavits in evidence being filed in lieu of oral examination-in-chief is as under:

1. In cases where the final order would be appealable, the deponent would have to appear before the Court to confirm the contents of the affidavit, for it to form part of the evidence.

2. The deponent can be subjected to cross-examination.

3. The affidavit in evidence should contain facts which are to the deponent's knowledge. Irrelevant statements cannot be made and the affidavit cannot travel beyond the pleadings.

4. If any part of the affidavit in evidence is objected to, including on the ground of mode of proof or admissibility, such objection(s) can be recorded and subject to the same being decided at the time of final adjudication, the cross-examination could proceed.

5. Unless and until the Court comes to the conclusion that the deposition is totally irrelevant or ex facie beyond the pleadings, deletion from the affidavit in evidence is not usually to be ordered.

6. The affidavit in evidence cannot contain matters of surmise, legal arguments or conjecture and cannot controvert the pleadings on record of either party.

PARTIES TO THE LIS CANNOT LOAD IRRELEVANT OR INADMISSIBLE EVIDENCE TO THE RECORD OF THE CASE

ICICI Bank Limited and Ors. vs. Lakshmi Nirman (Bangalore) Pvt. Limited: MANU/KA/4241/2019 ..... Section 5 of the Indian Evidence Act, 1872 deals with the right to produce evidence in any suit or proceedings, relating to the existence or non-existence of every fact in issue and also the facts relevant to the facts in issue; Sections 6 to 55 of the Act speak of relevancy of the facts; there are certain other facts which are not covered by sections 6 to 55 which may have to be elicited for the purpose of discrediting a witness or to prove his unworthiness; similarly, whatever is likely

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to be construed as an admission by the witness, evidence can be lead to explain away or to show such circumstances which render the same unworthy of it's face value. .....ordinarily, parties should be allowed to lead their evidence either by examination-in-chief or by production of other evidentiary material or by cross-examination of the witnesses of the other side, subject to all just exceptions; if the parties going to the trial have understood each other's case, the absence of pleadings may pale into insignificance; in any circumstance, whether there is plea or not, will be addressed by the trial Court only after recording the evidence; I hasten to add that this does not mean that the parties to the lis can load irrelevant or inadmissible evidence to the record of the case.

AFFIDAVIT WHEN IT BECOMES EVIDENCE

Justice Dr. B. Siva Sankara Rao, of AP High Court in the case of V. Rama Naidu and Ors. vs. V. Ramadevi: MANU/AP/0286/2018, has discussed on the subject with various provisions of law and precedents:-

(a) Section 1 of the Indian Evidence Act (for short Evidence Act lays down that the Evidence Act applies to all Judicial Proceedings in or before any Court but not to affidavits presented to any Court or officer nor to proceedings before an arbitrator. So provisions of the Evidence Act does not apply to mere affidavits.

(b) The definition of evidence as per Section 3 Evidence Act is an inclusive (though not an exhaustive) definition. It says that evidence means and includes. (1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry; such statements are called oral evidence. (2) All documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.

(c) The oral evidence (oral testimony of a person) as per Section 60 must be direct or original and not unoriginal or hearsay. The

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exceptions to this general rule are contained in Sections 6, 11 & 24 to 34 etc.

(d) Affidavit is normally understood as a written statement on oath. Section 3(3) of the General Clauses Act explains that Affidavit includes legally allowable affirmation and declaration instead of swearing. Thus, affidavit could be the oral testimony or statement on oath of a person.

Order 18 Rule 4 CPC starts with its heading recording of evidence says that- (i) In every case the examination in chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence and proof and admissibility of documents filed if any with affidavit to rely shall be subject to the orders of the Court. (ii) The evidence in cross examination and re-examination of the witness in attendance (whose evidence in chief examination furnished to the Court by affidavit), shall be taken either by the Court or by the Commissioner appointed by the Court..... The literal meaning of the words in every case clearly indicates that the chief examination of a witness shall be on affidavit. This wording got its own importance to a reasonable conclusion that the affidavit by itself is not evidence in chief examination. It is only when the affidavit filed in Court is taken by Court as chief examination the statement of facts contained in the affidavit amounts to evidence in chief examination. ..... It is also because, though the heading of Order 18 Rule 4 CPC speaks about recording of evidence, out of the 8 sub rules to the Rule 4, neither in Order 18 Rule 4(1) nor in the proviso to it there is any mention or whisper of the word evidence since affidavit by itself is not evidence. The Order 18 Rule 4 sub-rules (2), (3), (4-proviso) & (6) CPC have employed the word evidence. It got its own significance. It is from the close reading of Order 18 Rule 4 Sub-rules 1 to 8 CPC; it becomes clear that the affidavit by itself is no evidence even it is filed in Court by party deponent or by any other deponents as witnesses to support the respective case of the parties. Once affidavit is filed, the Court has to receive. ..... Coming to the interpretation of the word shall in Order 18 Rule 4(1) the Apex Court in the Salem Advocates Bar Association Case -MANU/SC/0912/2002 : AIR 2003-SC-189 at paras 17 to 19 observed that from the reading of Order 18 and

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Order 16 together, it is evident that Order 18 Rule 4(1) applies to a case where a party to a suit without applying for summoning brings any witness to give evidence or produce any document. examination in chief of such witness not to be recorded in Court but shall be in the form of an affidavit. Whereas a witness is summoned the Court can direct to file affidavit or can give option to the witness either to file affidavit or to be present in Court for his examination and the Court can even record evidence in part and direct Court commissioner to record in part. .....

In fact a full bench of this Court in Rita Pandit v. Atul Pandit MANU/AP/0031/2005 : 2005 (1) An.W.R. 280 (F.B.) (A.P.) : 2005 (2) ALD 230 (FB) observed, ... 17. An affidavit is merely an affidavit when it is filed in the Court. But when a witness appears for cross-examination, it is necessary for the witness either to confirm or differ the contents of the affidavit. After his confirmation or denial of the contents of affidavit, whatever recorded is the evidence and if the witness confirms to the affidavit, the affidavit would become part of the statement made by the deponent before the Court. Therefore what is finally taken as evidence by the Court is not the affidavit, but what is contained in the affidavit, if confirmed by the dependent (sic. deponent) when he appears before the Court for cross-examination.

Whether evidence can be recorded by Video Conference concerned, the Apex Court in State of Maharashtra v. Dr. Praful B. Desai MANU/SC/0268/2003 : 2003 CrLJ 2033 : (2003) 4 SCC 601 held that recording of evidence even in a criminal case by way of video conferencing is permissible. So long as the accused and/or his pleader is present when the evidence is recorded by the said way it is recording of evidence in the presence of the accused as per the requirements of Section 273 CrPC as per the procedure established by law. The term presence does not mean actual physical presence as it includes even virtual presence in Court by video and audio linkage between both ends. Evidence since oral and documentary it can be produced by way of electronic records including video conference with in the definition of Section 3 Evidence Act. The Apex Court laid down certain guidelines and conditions to record the evidence through Video Conferencing.

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Similarly in a civil case in Twentieth Century Fox Film Corp v. NRI Firm Production Associates (P) Ltd. MANU/KA/0060/2003 : 2003 (3) ILD 505 (Karnataka) it was held that hearing suit and examination of witnesses and recording of evidence by commissioner contemplated by Order 18 Rule 4 from the words Witness in attendance are to be understood as person being present and it need not be physical presence thus, recording of evidence through Audio, Video link is permissible complying the words in attendance. There are guidelines laid down therein for the precautions to be taken in recording such evidence.

From the reading of Sec. 1 Evidence Act and Or. 18 R.4 CPC, there is no wording in Or. 18 R. 4(1) CPC to say that mere filing of affidavit styling as chief examination by affidavit itself is evidence. It is not even stated as affidavit is part of Court record to read. The provisions further speak about cross examination and re-examination after a deponents affidavit became his chief examination. It is to mean affidavit can be taken as chief examination evidence by Court and it is therefrom to that chief examination the provisions of the law of evidence guided by the Evidence Act automatically apply.

As such, before taking the affidavit as chief examination, from the notice to opposite party requires to be given in advance, any objections to the contents of the affidavit on relevancy and admissibility, including within the scope of pleadings or traveled beyond the pleadings, the court has to decide such objection and take on oath as chief examination only within the scope of pleadings and take such extent relevant and admissible in evidence; for such affidavit once taken on oath forms part of evidence as chief examination and under Section 136 Evidence Act the party leads evidence for its admitting as evidence has to satisfy on admissibility and relevancy; so that irrelevant portion of affidavit can be eschewed from record before taking the affidavit as chief examination evidence; for once taken as evidence in chief of the affidavit or any portion of it, **eschewing any portion from the evidence in chief of the affidavit taken on oath on record does not arise**, but for ignoring from consideration in ultimate appreciation from any inadmissibility and irrelevancy of any portion of evidence.

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Needless to say **there can be only one affidavit in chief examination** of each witness in the case and allowing of number of affidavits in chief examination of one in continuation to the other will not arise for it defeats the very object of introducing the provision of taking affidavit as chief examination and also for the wording of affidavit and not affidavits, apart from the fact that after taking the affidavit on oath as chief examination and marking of documents by the Court or by the Court Commissioner subject to order and approval of court so for as the documents marking concerned, either of them can record any further chief examination of the witness and the same also lends support from the Apex Courts expression in the Salem Advocates Bar Association Case-1 supra of the Court can direct to file affidavit or can give option to the witness summoned either to file affidavit or to be present in Court for his examination and the Court can even record evidence in part and direct Court commissioner to record in part.

.....(h) Further, Section 16 of the Family Courts Act permits evidence of formal character to prove by affidavit.

(i) Section 30(c) CPC says Court may order any fact to be proved by affidavit. This provision infact applies to affidavit reception in interlocutory applications for deciding on merits vis-à-vis in suits or other original applications during trial from its reading with Order 19 Rules 1 to 3 CPC.

(j) Order 19 Rules 1 to 3 CPC as detailed above say that any Court may at any time order that a particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing on such condition as the Court thinks reasonable,

(k) Sections 32 and 33 Evidence Act also speak on admissibility with evidentiary value as relevant even statement of a living person under certain contingencies viz., who cannot be found, who has become incapable of giving evidence or whose evidence cannot be procured without an amount of unreasonable delay or expense.

(l) In Kalyan Peoples Co-op. Bank v. Dulhan Bibi A.A. Patil MANU/SC/0003/1962 : AIR 1966 SC 1072 : 1963 (2) SCR 348 -it was held that deposition of a person in a previous proceeding is admissible in evidence in a subsequent judicial proceeding by consent of the parties. Infact like any previous statement it can be

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used for contradiction or to impeach the credit of the witness as per Sections 145 and 155(3) Evidence Act, if not for corroboration as per Section 157 Evidence Act.

(m) M/s. Mangilal Rungta v. Manganese Ore (India) Ltd. MANU/MH/0264/1987 : AIR 1987 Bombay 87(B) - it was held that proof of facts of whole suit, irrespective of nature of the suit, by affidavit under Order 19 Rule 1 and 2 CPC, is permissible and cannot be said as impermissible and holding otherwise would be too unrealistic and too technical a view. of the law of procedure resulting in to great waste of public time and money and would through unnecessary burden on our already over burdened legal machinery.

The above provisions and propositions to a considerable extent are exceptions to the general rule in Section 1 Evidence Act that Evidence Act does not extend to affidavits. These provisions require order of the Court permitting (i) any party to prove any facts by affidavit. Unless such an order is passed to take the affidavit contents as evidence, (subject to cross examination if any), any affidavit contents by itself is not evidence in chief examination in suits and original petitions, but for to consider proof of any facts in interlocutory applications. In C.S. Rowjee v. State of Andhra Pradesh MANU/SC/0221/1964 : AIR 1964 SC 962 : 1964 (6) SCR 330 it was held by the Apex Court that facts in the affidavit uncontroverted by opposite party can be deemed as admitted to rely.

AFFIDAVIT IS NOT LEGAL EVIDENCE - WITHIN THE MEANING OF SECTION 3 OF THE INDIAN EVIDENCE ACT

AYAAUBKHAN NOORKHAN PATHAN VS STATE OF MAHARASHTRA & ORS. AIR 2013 SC 58 It is a settled legal proposition that an affidavit is not evidence within the meaning of Section 3 of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act'). Affidavits are therefore, not included within the purview of the definition of "evidence" as has been given in Section 3 of the Evidence Act, and the same can be used as "evidence" only if, for sufficient reasons, the Court passes an order under Order XIX of the Code of Civil Procedure, 1908 (hereinafter

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referred to as the 'CPC'). Thus, the filing of an affidavit of one's own statement, in one's own favour, cannot be regarded as sufficient evidence for any Court or Tribunal, on the basis of which it can come to a conclusion as regards a particular fact-situation. (Vide: Sudha Devi v. M.P. Narayanan & Ors., AIR 1988 SC 1381; and Range Forest Officer v. S.T. Hadimani, AIR 2002 SC 1147).

THE CONDUCT OF THE PARTIES MAY BE AN IMPORTANT FACTOR, WITH REGARD TO DETERMINING WHETHER THEY SHOWED THEIR WILLINGNESS TO GET THE SAID ISSUE DETERMINED ON THE BASIS OF AFFIDAVITS

AYAAUBKHAN NOORKHAN PATHAN VS STATE OF MAHARASHTRA & ORS. 2013 AIR 58 However, the conduct of the parties may be an important factor, with regard to determining whether they showed their willingness to get the said issue determined on the basis of affidavits, correspondence and other documents, on the basis of which proper and necessary inferences can safely and legitimately be drawn.

In Ramesh Kumar v. Kesho Ram, AIR 1992 SC 700, Court considered the scope of application of the provisions of O. XIX, Rr. 1 and 2 CPC in a Rent Control matter, observing as under:- "The Court may also treat any affidavit filed in support of the pleadings itself as one under the said provisions and call upon the opposite side to traverse it. The Court, if it finds that having regard to the nature of the allegations, it is necessary to record oral evidence tested by oral cross- examination, may have recourse to that procedure."

PLAINTIFF CANNOT BE PERMITTED TO FILE SUCH APPLICATIONS TO FILL THE LACUNAE IN ITS PLEADINGS AND EVIDENCE

THE HONBLE JUSTICE P. SATHASIVAM & THE HONBLE JUSTICE JAGDISH SINGH KHEHAR of Supreme Court of India in

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the case of M/S Bagai Construction vs M/S Gupta Building Material Store MANU/ SC 0195/ 2013, it is held that The perusal of the materials placed by the plaintiff which are intended to be marked as bills have already been mentioned by the plaintiff in its statement of account but the original bills have not been placed on record by the plaintiff till the date of filing of such application. It is further seen that during the entire trial, those documents have remained in exclusive possession of the plaintiff but for the reasons known to it, still the plaintiff has not placed these bills on record. In such circumstance, as rightly observed by the trial Court at this belated stage and that too after the conclusion of the evidence and final arguments and after reserving the matter for pronouncement of judgment, we are of the view that the plaintiff cannot be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him.

AFTER VARIOUS AMENDMENT IN THE CPC, IT IS DESIRABLE THAT THE RECORDING OF EVIDENCE SHOULD BE CONTINUOUS AND FOLLOWED BY ARGUMENTS 2013 SC

THE HONBLE JUSTICE P. SATHASIVAM & THE HONBLE JUSTICE JAGDISH SINGH KHEHAR of Supreme Court of India in the case of M/S Bagai Construction vs M/S Gupta Building Material Store MANU/ SC 0195/ 2013, it is held that After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered.

PLAINTIFF HAS FILED APPLICATIONS AFTER MORE THAN SUFFICIENT OPPORTUNITY HAD BEEN GRANTED TO HIM TO PROVE HIS CASE – NOT TENABLE

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THE HONBLE JUSTICE P. SATHASIVAM & THE HONBLE JUSTICE JAGDISH SINGH KHEHAR of Supreme Court of India in the case of M/S Bagai Construction vs M/S Gupta Building Material Store MANU/ SC 0195/ 2013, it is held that In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC.

WHEN A JOINT TRIAL CAN BE ORDERED BY THE COURT - IF ONE ACTION CAN BE ORDERED TO STAND AS A COUNTERCLAIM IN THE CONSOLIDATED ACTION, A JOINT TRIAL CAN BE ORDERED

In State Bank of India v. Ranjan Chemicals Ltd.,(2007) 1 SCC 97, the Supreme Court indicated the circumstances wherein a joint trial could be ordered :- A joint trial can be ordered by the court if it appears to it that some common question of law or fact arises in both proceedings or that the right to relief claimed in them are in respect of or arise out of the same transaction or series of transactions or that for some other reason it is desirable to make an order for joint trial. Where the plaintiff in one action is the same person as the defendant in another action, if one action can be ordered to stand as a counterclaim in the consolidated action, a joint trial can be ordered. An order for joint trial is considered to be useful in that, it will save the expenses of two attendances by the counsel and witnesses and the trial Judge will be enabled to try the two actions at the same time and take common evidence in respect of both the claims. If therefore the claim made by the Company can be tried as a counterclaim by the Debt Recovery

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Tribunal, the court can order joint trial on the basis of the above considerations. It does not appear to be necessary that all the questions or issues that arise should be common to both actions before a joint trial can be ordered. It will be sufficient if some of the issues are common and some of the evidence to be let in is also common, especially when the two actions arise out of the same transaction or series of transactions. A joint trial is ordered when a court finds that the ordering of such a trial, would avoid separate overlapping evidence being taken in the two causes put in suit and it will be more convenient to try them together in the interests of the parties and in the interests of an effective trial of the causes. This power inheres in the court as an inherent power.

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CHAPTER-3

PRESUMPTION

PRESUMPTION REGARDING DOCUMENTS OF 30 YEARS OLD DOES NOT APPLY TO WILLS

Bharpur Singh Vs. Shamsher Singh MANU/SC/8404/2008 : 2009 (3) SCC 687 that, a presumption regarding documents of 30 years old does not apply to Wills and thus a Will has to be proved in terms of Section 63(c) of the Indian Succession Act, read with Section 68 of the Indian Evidence Act.

PRESUMPTION ABOUT 30 YEAR OLD DOCUMENT

T. Ramesh and Ors. vs. Laxmamma and Ors.: MANU/AP/0310/2017

(i). In Harihar Prasad Singh Vs. Balmiki Prasad Singh MANU/SC/0008/1974 : 1975 (1) SCC 212, it was held by placing reliance upon the expression in Basanth Singh Vs. Brijraj Sadan Singh MANU/PR/0038/1935 : AIR 1935 PC 132 (c)- regarding presumption of thirty years old document under Section 90 of the Indian Evidence Act, that a presumption can be raised only with reference to original document and not to copies thereof. If the document happens to be signed by the agent of the person against whom the presumption is sought to be raised and there is no proof that he was an agent, Section 90 does not authorize the raising of a presumption as to the existence of authority on the part of the agent to represent that person. Even earlier to it, in the 3 Judge Bench expression of the Apex Court in Kalidindi Venkata Subbaraju Vs. Chintalapati Subbaraju MANU/SC/0203/1967 : AIR 1968 SC 947 it was held a presumption is only in respect of original document and not for copies. No doubt while holding as per Section 59 of the Indian Succession Act, onus is on the person who relies on Will to establish that said testator was competent to

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execute, there was reference in making said observation of presumption in a Will case. It did not specifically observed with reference to Section 63 of the Indian Succession Act of same available to Will to draw presumption including in referring to the earlier expression of Munnalal Vs. Kashibai MANU/PR/0040/1946 : 1947 AIR PC 15, Basant Singh supra and Harihar Prasad Vs. Deonarayan Prasad MANU/SC/0092/1956 : AIR 1956 SC 305, to which Deonarayan and Munnalal supra, is also in cases of copy of will marked in not drawing the presumption for not original. It is leave apart said issue not raised to consider before the trial Court or earlier round of litigation in the first appellate Court or even on second appeal remand of O.S. No. 90 of 1981 and even from common disposal of the three appeal suits by the 1st appellate Court later even. Thereby even it is a pure question of law difficult to accept that can now be raised and in Munnalal supra that was relied in Kalidindi supra it was categorically observed that no presumption to draw for no pleading that will was in existence and acted upon after death of attestor as a last will and in sound and disposition state of mind he made the bequeath.

(ii). In Union of India Vs. Ibrahim Uddin 1, it was held regarding the general presumption of thirty years old document that the presumption is in respect of genuineness of a document as regards signature, execution and attestation, but not as regards the correctness of the contents of the document, which are to be proved by other independent evidence.

(iii). In Chakicherla Audilakshmamma Vs. Atmakaru Ramarao MANU/AP/0078/1973 : AIR 1973 AP 149 it was held by a Division Bench of this Court that, it would be dangerous no doubt, for the courts to draw presumption of due execution mechanically on the face of the documents purporting to be 30 years old; and coming from proper custody in as much as the presumption dispense with proof of due execution, thereby the Court must act with extreme caution and utmost circumspection from the language used "May presume" in Section 90 of the Evidence Act conferring judicial discretion to be exercised by the Court in drawing the presumption. It is within the judicial discretion of the Court having regard to facts and circumstances of each case. On an analysis of

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the provisions of Section 90 of the Evidence Act and its interpretation judicially, we may deduce the following propositions:

1. The presumption applies to documents proved to be 30 years or more old;

2. The document must come from proper custody;

3. The presumption is discretionary and in cases where a document is ex-facie suspicious, the Court may very well refuse to take the presumption and call upon the party to offer other proof, forthwith;

4. The presumption can only be applied to the documents, which bear the signature of the writer or of witnesses, and the presumption cannot be drawn in the case of unsigned or anonymous papers; and

5. The extent of presumption relates only to the signature, execution or attestation of a document that is to say, its genuineness. The drawing of the presumption does not connote the idea that the contents of the documents are true or that they have been acted upon;

6. The presumption applies only to original documents and not on any copies thereof, certified or otherwise.

On facts, it was held that the document appears to be not genuine and no presumption under Section 90 of the Evidence Act can be drawn to it as the unsuspicious character of the document is absent, before the presumption contemplated by Section 90 of the Evidence Act could be drawn in its favour. On the question of proper custody, we have to bear in mind the Explanation appended to Section 90 of the Evidence Act. As per the Explanation, documents are said to be in proper custody, if they are in the place in which, and under the care of the person with whom they would naturally be, but no custody is improper, if it is proved to have had a legitimate origin, or if the circumstances of a particular case are such as to render such origin probable.

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(iv). From the 69th report of the Law Commission of India, the amendments suggested include, amendments to Section 68 of the Evidence Act, and under Sections 57, 58 and 63 of the Indian Succession Act and Sections 59 and 123 of the Transfer of Property Act. The Law Commission 69th report recommendations also referred the opinion of Sarkar, the Author on the Evidence Act, that Section 68 of the Evidence Act should not apply, if the Will is more than 30 years old under Section 90 of the Evidence Act or was not produced, in spite of notice to produce under the Evidence Act; which proposals are broadly in conformity with the English Law, as it stands after the UK Evidence Act, 1938.....which accept even in case of Wills for other situations, where witness is kept out of way..... Sarkar on Evidence (15th edition-1999) at page 1124, Wigmour on Evidence at Para 1288, speak that the theory that parties must be deemed to have agreed that the attestor will be a person, who should speak about the circumstances of the execution, is not correct and there is no such agreement can be implied, particularly, when attestation is required by law. As per Sarkar, Page 1124 the attestor is in practice, not usually a person who knows anything about the circumstances preceding the document execution and also on the aspect, the words shall not be 'used in evidence' mean that the document can be used for collateral purposes. Several Jurists in America relaxed the said rule for the purpose of collateral or incidental use (Wigmour Section 129 quoted by Sarkar Page 1129) as relaxed the rule in admission of a mortgage bond in AIR 1939 Allahabad 366, MANU/UP/0399/1915 : AIR 1915 Allahabad 254. The Law Commission thus proposed that the inadmissibility must be confined to the testamentary disposition and not for collateral purpose and recommended that Section 68 of the Evidence Act must be confined only to Wills and required to be re-drafted and the exceptions added and referred to in the 69th report required. Said recommendation is not incorporated by any amended legislation.

(v). Regarding the written authority by husband to wife in a Will to adopt a child by her after his life time under uncodified Hindu law, it was observed in Para 453 of Mullah at page 780, that the written

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authority must be a registered one, unless it is given under a Will vide decision Mottasiddilal V. Kundanlal 1906 (28) All. 377 and Ravath V. Beni Bahadur AIR 1926 PC 1927 and if the authority is given under a Will, it must be executed in accordance with the formalities required by Section 63 of the Indian Succession Act. It is to say collateral purpose is not recognized or considered in the above.

(vi). In Paranru Radhakrishnan Vs. Bharathan MANU/KE/0030/1990 : AIR 1990 Kerala 146, by referring Sections 68 and 69 of the Evidence Act and also referring to the earlier expressions of the Calcutta, Oudh and Allahabad High Courts, the Kerala High Court held that from a reading of Section 68 of the Evidence Act, it is evident that a document, which is required by law to be attested, shall not be used at all as evidence, until one of the attesting witnesses, at least, has been examined to prove its execution. The imperative wording of Section 68 of the Evidence Act makes it clear that it does not permit utilisation of a document, which is required by law to be attested, as evidence until it is proved, strictly in accordance with the provisions of the Section. Said expression in Paranru Radhakrishnan and observations of the Author-Mullah were quoted with approval by this Court in Cheedella Padmavathi supra.

(vii). In fact for Wills, even the provisions of the Evidence Act apply other than Sections 91 to 99, once Section 68 of the Evidence Act is not dispensing with the proof of a Will, irrespective of non-denial of execution, by drawing the difference between Wills and other attestable documents, the question of drawing presumption of 30 years old document under Section 90 of the Evidence Act apart from, does not arise for Wills, even taken as arises, that no way dispense with the special requirements of Section 63 of the Indian Succession Act, 1925, which is besides the Special Law on Wills when compared to the Evidence Act, as a general law on all attestable documents, apart from otherwise being the Indian Succession Act, 1925, a subsequent legislation to the Indian Evidence Act, 1872, in that way also prevails. Suffice to say, the

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presumption of 30 years old document that can be drawn under Section 90 of the Evidence Act, 1872 has no application to Wills from its implied repeal/exclusion in view of the special requirements of Section 63 of the Indian Succession Act, 1925.

(viii). It was also held by the Apex Court three Judges Bench in R. Venkatachala Iyengar Vs. B.N. Thimmajamma MANU/SC/0115/1958 : AIR 1959 SC 443, that a Will has to be proved like any other document, except that evidence tendered in proof of a Will should additionally satisfy the requirements of Section 63 of the Indian Succession Act, apart from the one under Section 68 of the Indian Evidence Act.

(ix). It was also categorically held by the Apex Court in Bharpur Singh Vs. Shamsher Singh MANU/SC/8404/2008 : 2009 (3) SCC 687 that, a presumption regarding documents of 30 years old does not apply to Wills and thus a Will has to be proved in terms of Section 63(c) of the Indian Succession Act, read with Section 68 of the Indian Evidence Act.

(x). In M.B. Ramesh (D) by LRs. Vs. K.M. Veeraje Urs (D) by LRs. MANU/SC/0462/2013 : [2013] 8 S.C.R. 573, by quoting with approval the expression in Bharpur Singh supra, it was held that the requirement of Section 63(c) of the Indian Succession Act, 1925 was once not fulfilled, viz., that two or more witnesses have to see the testator sign or affix his mark to the Will, and each of the witnesses have also to sign the Will in the presence of the testator, the document even of 35 years old, no presumption of genuineness of signatures, due execution and attestation can be drawn.

(xi). Thus, Section 90 of the Indian Evidence Act, 1872, can be said from the above law as not applicable to the proof of a Will and the failure to apply, the same by the Courts below is no way a perverse and unsustainable conclusion and same is no way devoid of merits, leave about the same not specifically raised in the Courts

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below, much less with factual foundation even to draw from what is discussed supra including from Munnalal supra; even same is taken as open to raise and to consider in the second appeal as a pure question of law.

PRESUMPTION OF OLD DOCUMENTS UNDER SECTION 90 – DISCRETION OF COURT TO ACCEPT IT SHALL BE EXCERCISED WITH REASONS

Sri Lakni Baruan And Others vs Sri Padma Kanta Kalita & Ors 1996 AIR 1253, JT 1996 (3) 268 Section 90 of the Evidence Act is founded on necessity and convenience because it is extremely difficult and sometimes not possible to lead evidence to prove handwriting, signature or execution of old documents after lapse of thirty years. In order to obviate such difficulties or improbabilities to prove execution of an old document, Section 90 has been incorporated in the Evidence Act, which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised if the documents in question is produced from proper custody. It is, however, the discretion of the Court to accept the presumption flowing from Section 90. There is, however, no manner of doubt that judicial discretion under Section 90 should not be exercised arbitrarily and not being informed by reasons.

PRESUMPTION OF REGISTERED SALE DEED

A.V. Rangacharya and Ors. vs. Pillanjinappa and Ors.: MANU/KA/0787/1998 - A Division Bench of this Court held that a registered deed to which father is a party cannot be questioned even by a minor son beyond the period of limitation. Even otherwise, proof of a sale-deed is not necessary and it is for the persons who attached the sale-deed to prove otherwise. The presumption under Section 17 of the "Registration Act. has to follow in respect of the liability and the proof of a registered sale-deed. The effect of a registered document under Sections 49 and 50 of the Registration Act cannot be taken by merely asserting that

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the document is bad. Even under Sections 67and 68of the Evidence Act. if it is found that the document has been presented by the person who executed the document and if he admits execution those documents cannot be attached as invalid in the eye of law. I find in a number of cases the registered documents are allowed to be attached and even Courts goes to the extent of saying that such documents are not valid in the eye of law. which view in my opinion in prima facie illegal and perverse. Till such registered instrument is set aside, by a course known to law, the document must be taken as a valid legal document and the purport for which it is executed must be upheld in a Court of law. Even the Supreme Court has made only one distinction wherein if the signature of the document is disputed or the person presenting the document has not admitted execution thereof, then proof of such document may be necessary. But in all other cases, till the document is set aside, by a decree of a Court, the effect of such document must be upheld by every Court that deal with the same. Therefore, the view of the Courts below regarding the validity of the sale-deed as well as the gift-deed which were 16 years and 14 years on the date of filing of the suit has to be set aside on this ground alone.

PRESUMPTION OF POWER OF ATTORNEY UNDER SECTION 85 EVIDENCE ACT

Mohanshet Purushottam Gujar vs. Jayashri Vasantrao Mahagaonkar: MANU/MH/0042/1979 -

5. Now, Section 85 of the Evidence Act contains a presumption as to powers of attorney and the presumption is couched tn the following language: "85. Presumption as to powers of attorney: The Court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a -notary public or any Court, Judge, Magistrate, Indian Consul or Vice-Consul, or representative of the Central Government was so executed and authenticated" **For this presumption to apply it is clear then that the power of attorney is required to be executed before and authenticated by one of the persons mentioned in Section 85**, and we are

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concerned in this case with the endorsement made by the Taluka Magistrate, Pune.

6. Now, turning to the power of attorney (Exhibit 89), we find in the first place that the same purports to bear the thumb impression and is not signed by the executant Baburao Bal-want Gokule; it, however, bears the usual endorsement, which is in the following words: "Solemnly affirmed and signed before me by Shri Baburao Balwant who is identified by Shri N.K. Navgire, Advocate, whom I personally know. Sd/- xxxxx Taluka Magistrate, Poona City." Poona: 14/3/66.

7. Two comments may be made as far as this endorsement by the Magistrate is concerned. It is clear that the use of the rubber stamp is inappropriate and this would be on two grounds: In the first place, what we have is a thumb impression though it may sometimes be called or could be regarded as equivalent to signature. Further, there was no question of any affirmation before the Magistrate. It is clear, however, that the rubber stamp which would be proper in case of ordinary affirmation has been utilised for the purpose of the alleged authentication under Section 85.

8. Ignoring these aspects which show a regrettable lack of care and attention by the Magistrate concerned, can it be held that the signature or the thumb impression of the executant is authenticated by the Magistrate as is required by S. 85 ? The fact that the Magistrate wants some identification by the advocate whose name is mentioned seems to suggest that the Magistrate is unsure of the identity of the person whose thumb impression is borne by the document. It is now well settled that authentication is more than mere execution before one of the persons designated in Section 85. In this connection I was referred" by the learned advocate for the petitioner to a decision of a single Judge of the Allahabad High Court in Wali Mohammed Chaudhari v. Jamal Uddin Chaudhari, MANU/UP/0211/1950 : AIR1950All524 . It is indicated in the aforesaid decision that, a power of attorney must show that the person authenticating has not merely certified that it is executed before himself but that he has further assured himself of the identity of the person who has signed the instrument. In this connection my attention was drawn by the learned advocate for the respondent to a decision of the Supreme

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Court in Jugraj Singh v. Jaswant Singh. MANU/SC/0413/1970 : [1971]1SCR38 . In para 7 of the report it has been observed that if a power of attorney is endorsed by a notary public, the fact that the notary does not say in his endorsement that the executant has been identified to his satisfaction is immaterial and it would flow from the fact that he had endorsed the document that it had been subscribed and sworn before him. Reliance was placed on the presumption of regularity of official acts, and the Supreme Court was pleased to hold that it was satisfied that the notary must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. Accordingly it was held that the power of attorney with which it was dealing was valid and effective both under Section 85 of the Evidence Act and S. 33 of the Indian Registration Act.

Jugraj Singh and Ors. vs. Jaswant Singh and Ors.: MANU/SC/0413/1970 - The short question in this case is whether Mr. Chawla possessed such a power of attorney for executing the document and for presentation of it for registration. Now, if we were to take into account the first power of attorney which was executed in his favour on May 30, 1963, we would be forced to say that it did not comply with the requirements of the law and was ineffective to clothe Mr. Chawla with the authority to execute the sale deed or to present it for registration. That power of attorney was not authenticated as required by Section 33 of the Indian Registration Act which in the case of an Indian residing abroad, requires that the document should be authenticated by a Notary Public. The document only bore the signature of a witness without anything to show that he was a Notary Public. In any event there was no authentication by the Notary Public (if he was one) in the manner which the law would consider adequate. The second power of attorney however does show that it was executed before a proper Notary Public who complied with the laws of California and authenticated the document as required by that law. We are satisfied that that power of attorney was also duly authenticated in accordance with our laws. The only complaint was that the Notary Public did not say in his endorsement that Mr. Chawla had been identified to his satisfaction. But that flows from the fact that

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he endorsed on the" document that it had been subscribed and sworn before him. There is a presumption of regularity of official acts and we are satisfied that he must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. This makes the second power of attorney valid and effective both under Section 85 of the Indian Evidence Act and Section 33 of the Indian Registration Act. ..... The only question is whether the second power of attorney was effective to render valid the transaction of sale and the registration of the document both earlier than the power of attorney. In our judgment, it would be So. Mr. Hardev Singh does not read into this matter the fact of ratification by Vernon Seth Chotia of his earlier power of attorney. The second power of attorney states in express terms that the first power of attorney was defective and was being ratified. Vernon Seth Chotia also stated in the second power of attorney that the act of Mr. Chawla would be his act which included not only the making of the document but also the presentation of that document. Now the law is quite clear that ratification relates back to the original act provided there is a disclosed principal..... It therefore follows that the second power of attorney was a valid document and it authorised Mr. Chawla to execute the document as well as to present it for registration. This being a document ratifying a former inconclusive act related back to the time when the first document was made and cured the illegality in the presentation for registration which had taken place.....

In (Dy. General Manager, Re-designated As Dy.Director, Isb Etc., v. Sudarshan Kumari and Ors., MANU/SC/1137/1996 : [1996]3SCR1094 .), the Supreme Court has noticed Section 8 of the Notaries Act. After noticing, the Supreme Court has ruled as under: "We have seen original rejoinder affidavit filed in this Court. They have approached one Notary who had initially attested it and later he had cancelled it without even verifying- the valid ground on which the earlier attestation came to be cancelled, same was again attestation came to be cancelled, same was again attested by one Sundersham Kumar on November 1, 1994. In view of the admitted position that she herself had not signed and asked someone who had signed it, it would be obvious that the person

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who had signed before him was not the respondent nor even the person was known to the Notary. None identified her before the Notary, yet he attested the affidavit. This would show that some Notaries are absolutely misusing the licence granted to them without any proper verification of the persons who has signed the document and are attesting false affidavits of impersonators."

In Prataprai Trumbaklal Mehta v. Jayant Nemchand Shah and Anr., MANU/MH/0030/1992 : AIR1992Bom149 , the Bombay High Court has considered once again Section 8 of the Notaries Act, This is what the Bombay High Court says:" "A notary has to make entry in the notarial register in respect of the notarial act of certifying copy of document as true copy of the original. Even if one or two columns of the said form is not applicable, entries must be made in the said register filling up remaining columns as are applicable and adapting the format accordingly. He has to place his signature and seal on the copy of the document and keep the copy on his record. It is the responsibility of a notary to satisfy himself that the original document intended to be executed before him was executed by the person concerned and not by someone else in the name of a different person i.e., about the identity of the executant of the original document by making all reasonable inquiries including insistence of identification of a member of the public by a legal practitioner known to the notary. Unless the executant is known to the notary personally, the notary must insist on written identification of the executant by an advocate and take signatures of both of them in token thereof in the notarial register in order to minimise the possibility of cheating by personification. Negligence of a notary in the discharge of his notarial functions may jeopardise the interest of third parties and public interest itself. Notaries enjoy high status throughout the country and the Courts take judicial notice of the seal of the notary and presume that the document in question must have been certified as true copy after taking of all possible care by the notary in comparing the copy with its original and due verification of the identity of the executant and the person appearing before the notary for the certification."

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T.L. Nagendra Babu vs. Manohar Rao Pawar : MANU/KA/0537/2004 - It is seen that the power of attorney has not signed at pages 1, 2 and 3. Though there is a seal of the Notary, there is no signature or initials of Sri Sangameshwar, a Notary in the case on hand. It is also seen that there is no identification of the signature of the executant. There is also no acceptable endorsement that the Notary was satisfied with regard to the identity of executant. There is also no date by the notary. With these prime deficient materials available on record with regard to the document, let me see the evidence on record also. ..... PW1 was examined and he says that the plaintiff was the son-in-law of the executant GPA. He was cross-examined and in the cross-examination, he admit that his son-in-law was in Australia in 1990. Ex.P2 was executed on 15.2.1996. He was present when Ex.P2 was executed. It was done before the Notary. But he does not know the name of the Notary. He has not noticed who executed the notary while executing G.P.A. ..... At this stage, I must also notice the Notaries Act. In terms of the Notaries Act, the document requires signature. In this connection, it is to be noticed that in terms of Section 85 of the Evidence Act as to whether the plaintiff has been properly represented and this Court has to see as to whether the pleadings are in conformity with C.P.C. ..... to have a presumption under Section 85 of the Evidence Act, the document in question namely the power of attorney has to be to the satisfaction of the Court in the matter of maintainability. 1 have already referred to the various infirmities in terms of the original power of attorney itself. Evidence is also sketchy from the plaintiff side. Though the defendant has argued at great length by pointing out the various infirmities, the learned Judge unfortunately has not chosen to give a proper finding and instead has chosen to reject the same on the ground of no issue. ..... In the given circumstances and on the basis of the material placed on record, I am satisfied that the requirement of the pleadings and the signature in terms of Order 6 Rule 14 and 15 is not made out by the plaintiff. ..... When serious arguments are advanced with serious materials, the Judge cannot brush aside the said contention in a casual way as has been done in the case on hand. I am sorry to see that a District Judge with experience has chosen to give a go-bye to a serious issue. The argument of the appellant

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in these circumstances is accepted. ..... The next contention that was raised by the learned Counsel is that there is no cause of action that has occurred in the case on hand. .....Order 7 Rule 5 reads as under: "Defendant's interest and liability to be shown: The plaint shall show that the defendant is or claims to be interested in the subject matter, and that he is liable to be called upon to answer the plaintiff's demand." ..... When the plaintiff approached a Court of law with serious allegations, he must give some details which compelled him to file the suit in question. ..... I have carefully perused the plaint and in the plaint, it is stated that on 14.5.2000, the GPA holder received some information that someone is digging the storm water drainage on the northern side of the suit schedule property. After visiting the site, the labourers only informed that the contractor had engaged them and they do not know at whose instance the work is undertaken. There is absolutely no allegation with regard to the defendant seeking for a declaration or an injunction as has been done in the case on hand. ..... There is also no prayer with regard to possession. Even according to the plaintiff's evidence, he is out of possession. If he is out of possession, then he ought to ask for a declaration for possession as well that has not been done. In these circumstances, as rightly pointed out by the learned Counsel for the appellant that the grant injunction in this state of affairs is wholly, unwarranted. At this stage, I must refer to a couple of Judgments cited by the appellant. .....The Supreme Court in MANU/SC/0136/1993 : AIR1993SC957 (Vinay Krishna v. Keshav Chandra and Anr.) has categorically ruled that in the absence of the plaintiff claiming relief of possession a discretion of Court for granting decree for declaration is barred.

PRESUMPTION OF DUE EXECUTION - CERTIFICATE ISSUED BY THE REGISTRAR IS TO SOME EXTENT EVIDENCE OF THE EXECUTION OF THE DOCUMENT – PRESUMPTION UNDER SECTION 89 – PROOF UNDETR SECTION 69

Kallawwa Virupaxappa Banakar and Ors. vs. Bhagawwa and Ors.: MANU/KA/2167/2017

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In regard to proving the execution of the will, the findings are that when both the attestors and the scribe were found to be dead, recourse could be had to Sections 58 to 60 of Registration Act, and that presumption under Section 90 of the Evidence Act could also be drawn as the impugned will was a 30 year old document. The trial Court referred to a judgment in the case of Gurbux Singh and Others Vs. Bishan Dass 'Chela' Kaul Dass and others (MANU/PH/0024/1970 : AIR 1970 P & H 182), where it has been held that certificate issued by the Registrar is to some extent evidence of the execution of the document, and admission of signature before the Registrar can form an evidence of the document. It also referred to some other decisions i) Hanumappa Bhimappa Koujageri Vs. Bhimappa Sangappa Asari (MANU/KA/0330/1995 : ILR 1996 KAR 1517), ii) Shiv Dass and others, Vs. Devki and others, (MANU/PH/0122/1978 : AIR 1978 P & H 285) iii) Kunhamina Umma and others, Vs. Special Tahsildar and others (AIR 1977 Kerala 41) to hold ultimately that since certification of the Sub -Registrar is available on the will, it could be inferred that the executor himself presented the document for registration and that the said certificate would suffice the proof with regard to execution. The trial Court also gave a finding that the will was free from suspicious circumstances, and therefore, dismissed the plaintiff's suit.

In regard to proving a will, the law is well settled and there have been numerous decisions on that point. Will is generally a subject matter of dispute, as it comes into force only after the death of the testator; and probably for this reason, the strict requirement of law is to examine atleast one attesting witness according to Section 68 of the Evidence Act. The burden of proof is on the propounder of the will. It is very much necessary that the will must be proved by examining an attesting witness and if none of the attestors is available, Section 69 of the Evidence Act prescribes a procedure to be followed. Drawing of presumption under Section 90 of the Evidence Act must be last resort if execution of the will can be proved neither under Sections 68 nor 69 of the Evidence Act. The propounder, having found it impossible to prove the execution of the will by following the procedure as provided under Section 69 of the Evidence Act, can also rely upon the certificate of

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registration under Section 60 of the Registration Act, if the will is registered. The registration of the will does not create any presumption of its genuineness nor the Registrar's signature on the document can be treated on par with that the attestor's signature.

The Supreme Court in the case of M.L. Abdul Jabbar Sahib Vs. H. Venkata Shastri and Sons and Others (MANU/SC/0019/1969 : AIR 1969 SC 1147), has held as below: "10. The Indian Registration Act, 1908 lays down a detailed procedure for registration of documents. The registering officer is under a duty to enquire whether the document is executed by the person by whom it purports to have been executed and to satisfy himself as to the identity of the executant: Section 34(3). He can register the document if he is satisfied about the identity of the person executing the document and if that person admits execution, [Section 35(1)]. The signatures of the executant and of every person examined with reference to the document are endorsed on the document, (Sec. 58). The registering officer is required to affix the date and his signature to the endorsements (Section 59). Prima facie, the registering officer puts his signature on the document in discharge of his statutory duty under Section 59 of Registration Act and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgment of his signature"

Here, the trial Court applied Sections 58 to 60 of the Registration Act to draw inference about due execution of the will. The propounders of the will stated that the attestors and the scribe were dead. For this reason, proof of will as provided under Section 68 of the Evidence Act was not possible. Rightly the lower Courts below came to this conclusion. But, before referring to Sections 58 to 60 of the Registration Act, the trial Court did not examine whether the propounder had taken recourse to Section 69 of the Evidence Act. In that way, the Courts below are not legally justified to straight away referring to Sections 58 to 60 of the Registration Act, and therefore, substantial question of law needs to be answered negatively. This case can be examined from another angle also.

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The learned counsel for the respondent referred to Section 89 of the Evidence Act which reads as below:- "89. Presumption as to due execution, etc., of documents not produced - The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law."

The circumstance put forward is that defendant No. 3 was called upon to produce the original will, as she was also a beneficiary under the will and it should have been with her. There was no reason for the propounders to have not produced the will before the Court, if really they had custody of it, especially when they based their entire defence on that will. When defendant No. 3 did not produce it, and said that she did not have it, besides repudiating the will, her conduct appeared to be unconscionable; she might have taken such a stand to deprive defendant No. 4 of the property as according to her he was a stranger to the family. This is the observation of the First Appellate Court, and it is not improbable also. Therefore, when defendant No. 3 did not produce the will having had its custody, as it could be supposed, the presumption under Section 89 of the Evidence Act as regards attestation and execution of the will can be drawn.

There is another circumstance, which has been noticed by the Courts below. It is admitted fact that the plaintiff had filed a suit, O.S. No. 91/1982 for permanent injunction against defendant Nos. 4 and 5 in the present suit under appeal. In that suit, having noticed these defendants relying on the will dated 29/9/1961, made an attempt to amend her plaint to state that the said will had been cancelled. The Court did not permit that amendment, but not withstanding that, it provides a ground to infer that the plaintiff had the knowledge about execution of a will by her father. Here in this case, the plaintiff may have stated that the said will is concocted, but her previous statement in her application made in the earlier suit not only precluded her, but also P.W. 1, a legal representative of the plaintiff from taking contrary stand. The trial Court has observed that the previous statement could not be duly proved through the plaintiff by bringing that statement to her notice as she was dead by the time recording of evidence commenced. But, such requirement as to

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bring to notice of the plaintiff or P.W. 1 was not necessary since in the plaint itself, it has been specifically stated that the plaintiff wanted to amend her plaint in her previous suit. This averment in the plaint amounts to an admission under Section 58 of the Evidence Act and reasonable inferences may be drawn that it was within the knowledge of the plaintiff that her father had executed a will which had been cancelled according to her. The plaintiff or her legal representative should have proved the cancellation of the will if at all the suit had to be decreed in their favour. This having not been done, the specific defence taken by defendant Nos. 4 and 5 becomes acceptable. Therefore, in the set of circumstances of this case, there is preponderance in the case put forth by the defendant Nos. 4 and 5, although execution of the will has not been proved in accordance with Section 69 of the Evidence Act.

PRESUMPTION UNDER SECTION 114 OF THE EVIDENCE ACT AGAINST A PARTY WHO DID NOT ENTER INTO THE WITNESS BOX

In **Vidhyadhar v. Manikrao AIR 1999 SC 1441**, the Supreme Court after referring to a large number of decisions on the question of adverse inference held as under: Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gubaksha Singh v. Gurdial Singh, AIR 1927 PC 230. This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh, AIR 1930 Lahore 1, and the Bombay High Court in Martand Pandharinath Chaudhri v. Radhabai Krishnarao Deshmukh, AIR 1931 Bombay 97. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat, also followed the Privy Council decision inSardar Gurbakhsh Singh's case (AIR 1927 PC 230) (supra). The Allahabad High Court in Arjun Singh v. Virender Nath, , held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab and Haryana High Court in Bhagwan Doss v. Bhishan Chand, , drew a presumption under

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Section 114 of the Evidence Act against a party who did not enter into the witness box.

PRESUMPTION OF REGISTERED DOCUMENT

Prem Singh vs. Birbal (2006) 5 SCC 353 the Apex Court has held that there is a presumption that a register document is validly executed. A registered document, therefore, prima facie could be valid in law. The onus of proof thus would be on a person who leads evidence to rebut the presumption.

PRESUMPTION UNDER THE EVIDENCE ACT THAT ALL OFFICIAL ACTS DONE BY THE OFFICIAL ARE DONE IN ACCORDANCE WITH PROPER PROCEDURE

RAMAKRISHNA GANAPAYYA vs. LAKSHMI NARAYANA THIMAYYA 1983 (2) KLJ 409 In paragraph 14 it has been observed - "It may, at once, be stated that there is a presumption under the Evidence Act that all official acts done by the official are done in accordance with proper procedure. It is not the defendant who has come to Court challenging such official act of the Tahsildar. It is the plaintiff who has come to Court challenging that the procedure followed by the Tahsildar was not in accordance with law. That being so, it is obvious that the burden is on the plaintiff to call for necessary records, making the Tahsildar a party to the suit and show that the procedure followed by him is vitiated either because there was no notice or because he has violated fundamental principles of natural justice."

ALL OFFICIAL ACTS ARE PRESUMED TO BE DONE AS PER LAW – PARTY ALLEGATING ILLEGALITY HAS TO PROVE IT

Supreme Court in **Gopal Narain v. State of Uttar Pradesh AIR 1964 SC 370**, held that there is a presumption when a statutory authority makes an order, that it has followed the prescribed

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procedure and such a presumption can only be rebutted by adducing appropriate evidence. However, the party, which makes an allegation that the act has not regularly been performed, the onus to prove lies upon him that the proper procedure has not been followed or the act has not been performed as was required under the law.

In Maharaja Pratap Singh Bahadur v. Thakur Manmohan Dey AIR 1966 SC 1931, the honourable Supreme Court considered the scope of illustration (e) of Section 114 of the Evidence Act and the question was : whether the Deputy Commissioner, who performed the particular function, had even been authorised to act. The court held that if an official act is proved to have been done, it will be presumed to have been regularly done and in such an eventuality and circumstances, the court can reasonably presume that the Deputy Commissioner, under appropriate rules, was duly authorised to act on behalf of the authority concerned.

A Constitution Bench of the honourable **Supreme Court, in State of Punjab v. Satya Pal Dang AIR 1969 SC 903,** dealt with the prorogation issued by the Governor. The court observed as under : "We are bound to take judicial notice of the prorogation and presume the regularity of these actions which must be interpreted as far as possible so that the thing done may be valid rather than invalid."

In **Narayan Govind Gavate v. State of Maharashtra AIR 1977 SC 183**, the honourable Supreme Court observed that presumption provided in illustration (e) of Section 114 of the Evidence Act is based on well-known maxim of law "omnia praesumuntur rite esse acta" (i.e., all acts are presumed to have been rightly and regularly done). The court further held, this presumption is, however, one of the fact. It is an optional presumption can be displaced by the circumstances indicating that the power lodged in an authority or official has not been exercised in accordance with law.

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PRESUMPTION OF PATERNITY AND BLOOD TEST

Rajanaika vs. Umesh and Ors. : MANU/KA/ 4656/ 2015

7. Section 112 of the Evidence Act clearly indicates that any person born during the continuance of valid marriage between his mother and any man or within 280 days after its dissolution and mother remaining unmarried during this period shall be a conclusive proof that he is the legitimate son unless it can be shown that parties to the marriage had no access to each other at anytime when the child could have been born.

8. Hon'ble Apex Court in Goutam Kundu's case[1] has held that Section 112 of Evidence Act lays down that if a person was born during the continuance of the valid marriage between his mother and any man, it shall be taken conclusive proof that he is the legitimate son born out of such marriage. In other words, presumption would arise with regard to legitimacy of the child. All presumptions are rebuttable presumptions, as such, Section 112 of the Evidence Act requires that the party disputing the paternity to prove that he had no access to his wife or lady as the case may be in order to dispel the presumption or in other words, such presumption arising under Section 112 of Evidence Act, can be rebutted by tendering evidence to show non-access to such woman. Access and non-access as held by Apex Court would mean the existence or non-existence of opportunities for sexual intercourse. As such, a presumption arises as indicated under Section 112 of Evidence Act that a child born through lawful marriage is legitimate and parties had access to each other. This presumption can be replaced or displaced by strong preponderance of evidence and not by mere balance of probabilities. In this background, it has been held by the Apex Court that Courts in India cannot order for conducting blood test as a matter of course and wherever applications are made for such prayer, in order to have a roving enquiry, prayer for blood test cannot be entertained and there must be strong prima facie case i.e., husband must establish non-access in order to dispel

[1] Goutam Kundu v. State of West Bengal and Another MANU/SC/0345/1993 : AIR 1993 SC 2295 : (1993) 3 SCC 418

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presumption arising under Section 112 of the Evidence Act. As a word of caution, it has been observed by Apex Court in Goutam Kundu's case that Courts must carefully examine as to what would be the consequence of ordering blood test as to whether it will have the effect of branding the child as bastard or mother as an unchaste woman. In conclusion, it has been held as under:

"22. It is a rebuttable presumption of law that a child born during the lawful wedlock is legitimate, and that access occurred between the parents. This presumption can only be displaced by a strong preponderance of evidence, and not by a mere balance of probabilities.....

26. From the above discussion it emerges.--

(1) That Courts in India cannot order blood test as a matter of course;

(2) Wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.

(3) There must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.

(4) The Court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.

(5) No one can be compelled to give sample of blood for analysis."

Riyazahmed Abdulsattar Nagarchi vs. Shipa and Ors.: MANU/KA/0920/2016 - DNA test cannot rebut the conclusive presumption envisaged under Section 112 of the Indian Evidence Act. The parties can avoid rigour of such conclusive presumption only by proving non-access, which is a negative proof.

Section 112 read with Section 4 of the Indian Evidence Act really have the effect of completely closing and debarring the party from leading any evidence with respect to the fact which the law

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says that to be the conclusive proof of legitimacy and paternity of child covered by the provisions of Section 112 of the Indian Evidence Act. When the parties to the marriage had access to each other, to order the blood group test violates the right under Article 21 of Constitution of India.

Smt. Kamti Devi & Anr. vs. Poshi Ram, MANU/SC/0335/2001 : (2001) 5 SCC 311

The facts were that the marriage between the appellant Kamti Devi and respondent Poshi Ram was solemnised in the year 1975. For almost fifteen years thereafter Kamti Devi remained childless and on 4.9.1989, she gave birth to a male child (his name is Roshan Lal). The long period in between was marked by internecine legal battles in which the spouses engaged as against each other. Soon after the birth of the child it was sought to be recorded in the Register under the Births, Deaths and Marriages Registration Act. Then the husband filed a civil suit for a decree declaring that he is not the father of the child, as he had no access to the appellant Kamti' Devi during the period when the child would have been begotten.

The trial court, on the basis of admitted facts that the parties are spouses of a valid marriage and that the marriage subsisted on the date of birth of the child, relied on the conclusive presumption mentioned in Section 112 of the Act. The trial court further held that the husband failed to prove that he had no access to his wife Kamti Devi during the relevant period. Accordingly the suit was dismissed.

But the first appellate court, after re-evaluating the entire evidence, found that the husband plaintiff succeeded in discharging the burden for rebutting the presumption by proving that he had no access to the mother of the child during a very long stretch of time covering the relevant period. On the strength of the said finding the first appellate court allowed the appeal and decreed the suit declaring that the plaintiff is not the father of the child Roshan Lal. The High Court refused to interfere with the

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aforesaid finding in the second appeal on the premise that "the question whether Roshan Lal is the son of the plaintiff is a pure question of fact which calls for no interference by the Court in the second appeal under Section 100 of the Code of Civil Procedure.

It was contended that the lower court was in error in not formulating a substantial question of law whether the burden of the husband to prove that he had no access to his wife was as heavy as the burden of prosecution in a criminal case.

It was answered thus: "7. Earlier there was a controversy as to what is the true import of the word access in Section 112 of the Act. Some High Courts held that access means actual sexual intercourse between the spouses. However, the controversy came to a rest when the privy Council held in Karapaya Severai vs. Mayandi (MANU/PR/0160/1933 : AIR 1934 PC 49) that the word access connotes only existence of opportunity for marital intercourse. The said legal principle gained approval of this Court when a three judge bench had held Chilukuri Venkateswarlu vs. Chilukuri Venkatanarayana (MANU/SC/0094/1953 : 1954 SCR 424) that the law has been correctly laid down therein.

8. When the legislature chose to employ the expression that a certain fact "shall be conclusive proof" of another fact, normally the parties are disabled from disrupting such proof. This can be discerned from the definition of the expression "conclusive proof" in Section 4 of the Act: "4. 'Conclusive proof.-When one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

9. But Section 112 itself provides an outlet to the party who wants to escape from the rigour of that conclusiveness. The said outlet is, if it can be shown that the parties had no access to each other at the time when the child could have been begotten the presumption could be rebutted. In other words, the party who wants to dislodge the conclusiveness has the burden to show a negative, not merely that he did not have the opportunity to approach his wife but that she too did not have the opportunity of approaching him during the relevant time. Normally, the rule of

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evidence in other instances is that the burden is on the party who asserts the positive, but in this instance the burden is cast on the party who pleads the negative The raison d'etre is the legislative concern against illegitimatizing a child. It is a sublime public policy that children should not suffer social disability on account of the laches or lapses of parents.

10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with Dioxy Nucleic Acid (DNA) as well as Ribonucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act, e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain unrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardized if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above.

11. Whether the burden on the husband is as hard as the prosecution to prove the guilt of the accused in a trial deserves consideration in the above background. The standard of proof of prosecution to prove the guilt beyond any reasonable doubt belongs to criminal jurisprudence whereas the test of preponderance of probabilities belongs to civil cases. The reason for insisting on proof beyond reasonable doubt in criminal cases is to guard against innocent being convicted and sent to jail if not to extreme penalty of death. It would be too hard if that standard is imported in a civil case for a husband to prove non-access as the very concept of non-access is negative in nature. But at the same time the test of preponderance of probability is too light as that might expose many children to the peril of being illegitimatised. If a court declares that the husband is not the father of his wife's

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child, without tracing out its real father the fall out on the child is ruinous apart from all the ignominy visiting his mother. The bastardized child, when grows up would be socially ostracised and can easily fall into wayward life. Hence, by way of abundant caution and as a matter of public policy, law cannot afford to allow such consequence befalling an innocent child on the strength of a mere tilting of probability. Its corollary is that the burden of the plaintiff-husband should be higher than the standard of preponderance of probabilities. The standard of proof in such cases must at least be of a degree in between the two as to ensure that there was no possibility of the child being conceived through the plaintiff-husband.

Hanumappa vs. Yallakka: MANU/KA/1797/2014 DNA Analysis - Deoxyribonucleic acid (DNA) consists of molecules that carry the body's genetic information and establish each person as separate and distinct. Until recently, DNA was found primarily within the nuclei of cells in the Chromosomes. DNA can now be extracted and processed from blood, tissue, spermatozoa, bone marrow, hair roots, saliva, skin cells, urine, feces, and a host of other biological specimens, all of which may be found at crime scenes. DNA has been recovered from fingerprints, cigarette butts, drinking cups, and hatbands and other articles of clothing.

DNA is generally found in cells that have a nucleus, hence the name nuclear DNA. However, some biological cells do not have nuclei, such as those forming fingernails, hair shafts, and teeth. What those cells do have is a more primitive form of genetic coding called mitochondrial DNA (mtDNA), found in the mitochondria, which are in the body of the cell. When a sperm and an egg join at conception, the new individual gets half of his or her nuclear genetic information from each parent. Conversely, mitochondrial DNA is inherited only from the mother. At, conception, all of the new person's mitochondria come from the mother. Since mitochondrial DNA is passed directly through maternal relatives, it serves as a perfect identity marker for those relatives. Indeed, the mitochondrial-DNA sequencing technique was originally developed by anthropologists to help trace human ancestors.

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Initially, DNA analysis required a fairly large sample, and the manual processing technique, called Restriction Fragment Length Polymorphism (RFLP), took up to 14 weeks, on average, to produce results. The RFLP "system is slow but produces good results. Technological advancements have led to a polymerase chain reaction (PCR), which takes small samples of DNA and reproduces as many copies as are needed for adequate analysis. Short tandem repeats (STRs), which are even smaller pieces of the DNA helix (ladder), can be reproduced using PCR to generate multiple copies in an instrument called a thermocycle. With the PCR-STR process, it takes about 24 hours to extract DNA from an evidentiary sample and only 2 to 3 hours to type the DNA using automation. It works well on degraded samples and on analysis of old cases.

Contamination

Just as contamination is an issue in the collection and packaging of evidence containing DNA, it is a very big issue in the handling of DNA during extraction and examination. It is also an issue that can affect the admissibility of, and credibility given to, DNA evidence in court. Coughing or sneezing while handing DNA evidence can cause contamination.

In Sharda v. Dharmpal, MANU/SC/0260/2003 : (2003) 4 SCC 493, a three-Judge Bench was concerned with the question **whether a party to the divorce proceedings can be compelled to a medical examination**. That case arose out of an application for divorce filed by the husband against the wife under Section 13(1)(iii) of the Hindu Marriage Act, 1955. In other words, the husband claimed divorce on the ground that wife has been incurably of unsound mind or has been suffering from mental disorder. The Court observed: (SCC p. 509 para 39).

"39. Goutam Kundu, MANU/SC/0345/1993 : (1993)3 SCC 418, is, therefore, not an authority for the proposition that under no circumstances the Court can direct that blood tests be conducted. It, having regard to the future of the child, has, of course, sounded a note of caution as regards mechanical passing of such order. In some other jurisdictions, it has been held that

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such directions should ordinarily be made if it is in the interest of the child."

18. While dealing with the aspect as to whether subjecting a person to a medical test is violative of Article 21 of the Constitution of India, it was stated that the right to privacy in terms of Article 21 of the Constitution is not an absolute right. This Court summed up conclusions thus: (Sharda case, MANU/SC/0260/2003 : (2003)4 SCC 493, (524), para 81)

"1. A matrimonial court has the power to order a person to undergo medical test.

2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution.

3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him."

Hanumappa vs. Yallakka: MANU/KA/1797/2014

a) That parties to a civil suit cannot be subjected to DNA Analysis as a matter of course;

b) Whenever applications are made with a prayer for such a test or analysis, by way of a roving enquiry the same should not be entertained; It is for the parties to place evidence in support of their respective claims and it is only in deserving cases that such a measure can be resorted to;

c) In cases where the father denies paternity, he must establish a strong prima facie case of "non access" in order to dispel the presumption arising under Section 112 of the Evidence Act, 1872. The burden of proof in that regard should be higher than the standard of preponderance of probabilities--it need not however, be proof beyond reasonable doubt;

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d) The Court must examine the possible consequence of such a test, especially in cases involving disputed paternity, having the effect of branding a child as a bastard and the mother as an unchaste woman;

e) A party to a civil case cannot be compelled to subject himself or herself to a test or analysis;

f) An order by a court directing a party to submit to a test would not however, be in violation of the right to personal liberty under Article 21 of the Constitution of India;

g) If on consideration of all aspects, if a court has passed an order against a party to submit himself to medical examination and such party refuses to so submit himself-the court may draw an adverse inference against him.

In Bhabani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and Anr. MANU/SC/0555/2010 : AIR 2010 SC 2851: (2010)3 SCC (Cri.) 1053: (2010)8 SCC 633, the question considered was as to whether the High Court was justified in issuing direction for DNA test of the child and the Appellant who, according to the mother of the child, was its father sua motu. It has been held as follows.--

21. In a matter where paternity of a child is in issue before the Court, the use of DNA test is an extremely delicate and sensitive aspect. One view is that when modern science gives the means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the Court must be reluctant in the use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.

22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the Court to reach the truth, the Court

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must exercise its discretion only after balancing the interests of the parties and on due consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the Court as a matter of course or in a routine manner, whenever such a request is made. The Court has to consider diverse aspects including presumption under Section 112 of the Indian Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the Court to reach the truth without use of such test.

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CHAPTER-4

IMPOUNDING OF DOCUMENT

DUTY TO IMPOUND THE DOCUMENT

The Apex Court in Government of Andhra Pradesh v. Smt. P. Laxmi Devi MANU/SC/1017/2008 : AIR 2008 SC 1640 as follows: "12. A perusal of the said provision shows that when a document is produced (or comes in the performance of his functions) before a person who is authorized to receive evidence and a person who is in charge of a public office (except a police officer) before whom any instrument chargeable with duty is produced or comes in the performance of his functions, it is the duty of such person before whom the said instrument is produced to impound the document if it is not duly stamped. The use of the word 'shall' in Section 33(1) shows that there is no discretion in the authority mentioned in Section 33(1) to impound a document or not to do so. In our opinion, the word 'shall' in Section 33(1) does not mean 'may' but means 'shall'. In other words, it is mandatory to impound a document produced before him or which comes before him in the performance of his functions."

LAW AND PROCEDURE IN DEFICIT STAMP DUTY AND IMPOUNDING OF DOCUMENTS EXPLAINED

JUSTICE S. Abdul Nazeer in the case of **Sri J. Prakash vs Smt. M.T. Kamalamma And Anr. Reported in AIR 2008 Kant 26, ILR 2007 KAR 4752, 2008 (2) KarLJ 202 has clarified the law on the subject of Stamp Duty and Duty penalty and procedure:- "**Section 33 of the Act deals with examination and impounding of instruments. It states that every person having by law or consent of parties authority to receive evidence, and every person incharge of a public office, except an officer of police, before whom any instrument, chargeable in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped,

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impound the same. To impound means, to keep in the custody of the law. Section 34 of the Act deals with a different situation. It states that instruments not duly stamped are inadmissible in evidence. However, such document may be admitted in evidence on payment of duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a penalty of rupees five, or, when ten times the amount of proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion. Section 37 of the Act lays down the procedure to deal with the instruments impounded under Section 33, or the instruments admitted in evidence upon payment of duty and penalty under Section 34; or the documents dealt with under Section 36 of the Act. In respect of the documents admitted in evidence upon payment of duty and penalty as provided under Section 34, Section 37 mandates the authority who receives the instrument in evidence and admits such instrument in evidence, to send an authenticated copy of such instrument together with a certificate in writing stating the amount of duty and penalty levied in respect of the said document and send such amount to the Deputy Commissioner or to such person as he may appoint in this behalf. In so far as the impounded document under Section 33 is concerned, Sub-section (2) of Section 37 mandates that the person so impounding an instrument has to send it in original to the Deputy Commissioner.

Section 38 of the Act deals with the power to refund the penalty paid under Sub-section (1) of Section 37 of the Act. It states that when a copy of an instrument is sent to the Deputy Commissioner under Sub-section (1) of Section 37, he may, if he thinks fit, refund any portion of the penalty in excess of five rupees which has been paid in respect of such instrument.

Section 39 of the Act deals with the power of the Deputy Commissioner to stamp instruments impounded under Section 33 of the Act. It states that when the Deputy Commissioner impounds any instrument under Section 33, or receives any instrument sent to him under Sub-section (2) of Section 37, not being an instrument chargeable with duty of not exceeding fifteen naye paise only or mortgage of crop chargeable under clause (a) or (b) of

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Section 3 with a duty of twenty-five paise, he shall adopt the following procedures:

(a) if he is of opinion that such instrument is duly stamped or is not chargeable with duty, he shall certify by endorsement therein that it is duly stamped, or that is not so chargeable, as the case may be;

(b) if he is of the opinion that such instrument is chargeable with duty and is not duly stamped he shall require the payment of the proper duty or the amount required to make up the same, together with a penalty of five rupees; or if he thinks fit; an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof, whether such amount exceeds or falls short of five rupees."

Chilakuri Gangulappa v. Revenue Divisional Officer, Madanapalli, AIR 2001 S.C. 1321 "Instruments impounded how dealt with.- (1) Where the person impounding an instrument under section 33 has by law or consent of parties authority to receive evidence and admits, such instrument in evidence upon payment of a penalty as provided by section 35 or of duty as provided by section 37, he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, and shall send such amount to the Collector, or to such person as he may appoint in this behalf. (2) In every other case, the person so impounding an instrument shall send it in original to the Collector. It is clear from the first sub-section extracted above that the court has a power to admit the document in evidence if the party producing the same would pay the stamp duty together with a penalty amounting to ten times the deficiency of the stamp duty. When the court chooses to admit the document on compliance of such condition the court need forward only a copy of the document to the Collector, together with the amount collected from the party for taking adjudicatory steps. But if the party refuses to pay the amount aforesaid the Collector has no other option except to impound the document and forward the same to the Collector. On receipt of the document through either of the said avenues the

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Collector has to adjudicate on the question of the deficiency of the stamp duty. If the Collector is of the opinion that such instrument is chargeable with duty and is not duly stamped he shall require the payment of the proper duty or the amount required to make up the same together with a penalty of an amount not exceeding ten times the amount of the proper duty or of the deficient portion thereof. ..... In the present case the trial court should have asked the appellant, if it finds that the instrument is insufficiently stamped, as to whether he would remit the deficient portion of the stamp duty together with a penalty amounting to ten times the deficiency. If the appellant agrees to remit the said amount the court has to proceed with the trial after admitting the document in evidence. In the meanwhile, the court has to forward a copy of the document to the Collector for the purpose of adjudicating on the question of deficiency of the stamp duty as provided in Section 40(1)(b) of the Act. Only if the appellant is unwilling to remit the amount the court is to forward the original of the document itself to the Collector for the purpose of adjudicating on the question of deficiency of the stamp duty. The penalty of ten times indicated therein is the upper limit and the Collector shall take into account all factors concerned in deciding as to what should be the proper amount of penalty to be imposed."

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CHAPTER-5

DOCUMENT AND ADVERSE INFERENCE

PLAINT AND WRITTEN STATEMENT ARE NOT PUBLIC DOCUMENTS

The Plaint and Written Statement are not Public documents as held in Gulab Chand and others v. Sheo Karan Lall Seth and others, MANU/BH/0012/1964 : AIR 1964 Pat 45. They cannot be admitted to prove the correctness of the statement contained therein, unless it is proved by direct evidence.

Gulab Chand & others v. Sheo Karanlall Seth & others, MANU/BH/0012/1964 : AIR 1964 Pat. 45 (DB), where under it has been held as follows: "Sub-section (2) of Section 74, can in no way include a Plaint. The Plaint is neither an act nor the record of an act of any Public Officer. There can be no strength in the contention that when the Plaint is presented and the Court makes an order admitting or registering it, the Plaint becomes an act or the record of an act of a Public Officer presiding over the Court. At the most, it will become a part of the record maintained by the Court in that case after the Plaint is admitted and registered, but that itself will not make it a public document. If it were, then anything filed in a case in a Court of law either petitions or pleadings, private communications or documents which a party would file in a case would become Public documents for the simple reason that they are on the record of a case in Court."

Pyare Lal v. Meher Singh and others, MANU/PH/3868/2010 : 2011 (162) PLR 82: "4. First of all, it must be noticed that a Certified copy of a Plaint or Written Statement or a Judgment filed in Court are not confidential but to the extent to which certified copies could be obtained by parties to proceedings, as also by any Third party, on giving reasons for seeking for copies, they are Public documents.

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A copy of Plaint or Written Statement are private documents, but if they are filed in Court and retained as permanent records by a Public Officer, they partake the character of "Public documents". If a person has a right to inspect such a Public document, the right to obtain a Certified copy is provided under Section 76 of the Act. .....

5. Unlike a document filed in a Civil proceeding, the Certified copy of which could be applied by a stranger only with the consent of person by whom it was produced, a copy of Plaint or Written Statement could be obtained by even a stranger after the disposal of the case. The copy of the Plaint and statement, which were exhibited in Court could, therefore, be relied on by a party as a Public document and no further proof is necessary. The mode of obtaining Certified copy of Plaint, Statement and Judgment in judicial proceeding is contained in the High Court Rules contained in Vol. IV, Chapter 17, ..."

MATERIAL ALTERATION OF A DOCUMENT - CONSEQUENCES

Padmini Raghavan vs. H.A. Sonnappa and Ors.: MANU/KA/2953/2013 - In paragraph 1378 of Volume 12 of Halsbury's Laws of England (Fourth Edition) it is observed as under:-- if an alteration (by erasure, interlineation, or other-wise) is made in a material part of a deed, after its execution, by or with the consent of any party to or person entitled, under it, but without the consent of the party or parties liable under it, the deed is rendered void from the time of the alteration so as to prevent the person who has made or authorised the alteration, and those claiming under him, from putting the deed in suit to enforce against an party bound by it, who did not consent to the alteration, any obligation, covenant, or promise thereby undertaken or made.

A material alteration, according to this authoritative work, is on which varies the rights, liabilities, or legal position of the parties as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally

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unascertained and a such void, or which may otherwise prejudice the party bound by the deed as originally executed.

The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed.

The Privy Council in Nathu Lal vs. Mussamat Gomti Kaur [MANU/PR/0034 /1940 : AIR 1940 SC 160] has held as under:-- A deed is nothing more than an instrument or agreement under seal; and the principle of those cases is that any alternation in a material part of any instrument or agreement avoids it, because it thereby ceases to be the same instrument. Again the Judicial Committee observed as under:-- "A material alteration has been defined in the rule as one which varies the rights, liabilities or legal position of the parties ascertained by the deed, etc.," and after applying that test they held that the alteration in that case was not material in the sense of altering the rights, liabilities or legal position of the parties or the legal effect of the document.

The Supreme Court in the case of Valiammal Rangarao Ramachar vs. Muthukumaraswamy Gounder and Another [: (1982) 3 SCC 508] held that, a motivated interpolation in a solemn document completely vitiates the document. Common course of human conduct has up till now indicated to us that solemn agreements have been violated when more price is offered, but here is a breach attempted for a lesser price and by a fairly crude attempt which stares in the face. The interpolation is motivated inasmuch as when translated it meant that the plaintiff who seeks specific performance of his contract was aware of and had the knowledge of an agreement which the vendor appears to have entered into with original defendant 2. There was hardly any explanation about the interpolation offered to the High Court and in fact none was forthcoming to us also.

The Apex Court in the case of Loonkaran Sethiya and Others vs. Mr. Ivan E. John and Others, [MANU/SC/0048/1976 : AIR

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1977) SC 336] after referring to the aforesaid passage of the Halsburys Law of England observed that: a material alteration is one which varies the rights, liabilities, or legal position of the parties, as ascertained by the deed in its original state, or otherwise varies the legal effect of the instrument as originally expressed, or reduces to certainty some provision which was originally unascertained and as such void, or which may otherwise prejudice the party bound by the deed as originally executed. The effect of making such an alteration without the consent of the party bound is exactly the same as that of cancelling the deed.

COURT MAY DRAW ADVERSE INFERENCE FOR WITHOLDING DOCUMENT

Supreme Court in case of Gopal Krishnaji Ketkar v. Mohammed Haji Latif and others, MANU/SC/0168/1969 : AIR 1968 SC 1413, wherein, it has been held that even if the burden of proof does not lie on a party, the court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts of an issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.

S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others, MANU/SC/0192/1994 : AIR 1994 SC 853, wherein, it has been held that in a proceedings before court, if fraud is played by a litigant by withholding vital document relevant to litigation, it is fraud on court and guilty party is liable to be thrown out at any stage.

Rajendra Singh v. Chandra Pal, MANU/UP/1176/2016 : 2016 (7) ADJ 564 : 2016 (3) AWC 3162, wherein, in para-16 has held that when it is found that the one party was acting in dishonest

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and mala fide way and was giving false defences and telling lie before the court, then such party should not be awarded and given benefit of his greed nor should be permitted to benefit them misuse of process of court.

DOCUMENTS IN POSSESSION NOT PRODUCED

MANU/SC/0195/2013 : (2013) 14 SCC 1 - M/s. Bagai Construction vs. M/s. Gupta Building Material Store, wherein it was held that if documents in exclusive possession of a party was not produced during the entire trial, those could not be produced at a belated stage.

IF HE WITHHOLDS A VITAL DOCUMENT IN ORDER TO GAIN ADVANTAGE AGAINST THE OTHER SIDE, THEN HE WOULD BE GUILTY OF PLAYING FRAUD ON THE COURT

In the decision, **S.P.Chengalvaraya Naidu vs. Jagannath, reported in 1994 (1) SCC 1**, the Hon'ble Supreme Court has held that a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. A litigant, who approaches the court, is bound to produce all the documents executed by him which are relevant to decide the litigation and if he withholds a vital document in order to gain advantage against the other side, then he would be guilty of playing fraud on the court as well as on the opposite party.

PARTY WITHOLDING BEST PIECE OF EVIDENCE – ADVERSE INFERENCE CAN BE DRAWN

Apex Court's judgment in the case of GOPAL KRISHNAJI KETKAR vs. MOHAMED HAJI LATIF AND OTHERS reported in MANU/SC/0168/1969 : AIR 1968 SC 1413 wherein it is held that if a party cannot put the best evidence, which is in his possession

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and if he withholds the same from the Court, the necessary adverse inference has to be drawn against him.

LEGAL EFFECT OF SIGNATURE OF REGISTRAR IN REGISTERED DOCUMENT

The Supreme Court in the case of M.L. Abdul Jabbar Sahib Vs. H. Venkata Shastri and Sons and Others (MANU/SC/0019/1969 : AIR 1969 SC 1147), has held as below: "10. The Indian Registration Act, 1908 lays down a detailed procedure for registration of documents. The registering officer is under a duty to enquire whether the document is executed by the person by whom it purports to have been executed and to satisfy himself as to the identity of the executant: Section 34(3). He can register the document if he is satisfied about the identity of the person executing the document and if that person admits execution, [Section 35(1)]. The signatures of the executant and of every person examined with reference to the document are endorsed on the document, (Sec. 58). The registering officer is required to affix the date and his signature to the endorsements (Section 59). Prima facie, the registering officer puts his signature on the document in discharge of his statutory duty under Section 59 of Registration Act and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgment of his signature" ..... It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation Under Section 3 (T.P.Act) are : (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a

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scribe or an identifier or a registering officer, he is not an attesting witness.

PROCEDURE FOR MARKING A DOCUMENT

SMS Tea Estates Pvt. Ltd. v. Chandmari Tea Company Pvt. Ltd. MANU/SC/0836/2011

"(i) The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registrable.

(ii) If the document is found to be not duly stamped, Section 35 of Stamp Act bars the said document being acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Section 35 and 38 of the Stamp Act.

(iii) If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the Court or before the Collector (as contemplated in Section 35 or 40 of the Stamp Act) and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

(iv) Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registrable. If the document is found to be not compulsorily registrable, the court can act upon the document, without any impediment."

PROCEDURE FOLLOWED BEFORE REGISTERING A DOCUMENT

The Supreme Court in the case of **M.L. Abdul Jabbar Sahib Vs. H. Venkata Shastri and Sons and Others AIR 1969 SC 1147)**, has held as below: "10. The Indian Registration Act, 1908 lays down a detailed procedure for registration of documents. The registering

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WHEN CONTENTS OF THE DOCUMENT AND EXECUTION OF THE DOCUMENT THOUGH ADMITTED BY THE PLAINTIFF HE WANTS TO DEVIATE FROM PORTION OF THE CONTENTS

Umarsab vs. Shakera Banu and Ors.: MANU/KA/2168/2017.....If the Court comes to the conclusion that the burden casts upon the plaintiff is satisfactorily discharged, then only the Court has to shift the onus on the defendants in order to disprove the case of the plaintiff, tentatively proved by the plaintiff. It is the duty of the plaintiff to establish before the Court that he has only executed the sale deed in favour of the defendant No. 1 with only intention to sell part of the survey number (two acres only). He cannot do so without admitting the document itself, as rightly observed by the trial Court and First Appellate Court. There is presumption in favour of the defendants with regard to the registered sale deed and contents thereon, when it is not specifically denied by the plaintiff that, he never executed the sale deed in favour of the defendant No. 1. It is his case that, he only intended to sell part of said survey number in favour of the defendant No. 1. Therefore, it goes to show that the contents of the said document and execution of the document though admitted by

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the plaintiff he wants to deviate from portion of the contents of the document in respect of the extent of the land. In order to establish it, the plaintiff has led evidence and he has produced record of right and mutation register extract. All documents show that, the necessary mutation has been accepted and records have made in the name of the defendant. In order to establish the intention of the parties the Court has to first look into the contents of the document itself. Because Indian Evidence Act, enumerates regarding the execution of oral evidence with regard to the contents of the document. When document itself is admitted, as a primary evidence contemporary of contrary circumstances have to be established by the parties to take up contentions in order to rebut the presumption raised in favour of the sale deed holder. The contents of the document discloses, the real intention of the parties for the purpose of entering into sale deed expressed therein. Thereafter the necessity of executing the sale deeds in favour of the opposite party. The execution of the document is made in presence of the witnesses before the Sub-Registrar. The plaintiff himself stated in the pleadings that he had sold the property for his family necessity. When he admitted the sale deed and his intention is expressed in the document itself, merely, because some oral evidence is adduced by the plaintiff the same cannot be simply accepted unless the evidence is of such a nature that, even if it is accepted, even an ordinary prudent man should say that the document is void and the document could not have been executed by the said person. If existence of such surrounding circumstances are not shown the presumption cannot be said to have been rebutted. All these factual aspects with regard to the execution of the sale deed, and the contents of the said document, passing of the ownership under Section 54 of Transfer of Property Act legal consequential thereon are all discussed with reference to the pleadings and evidence of the parties. The intention of the parties shows that, the major portion of the land had been sold by plaintiff and purchased by the defendant, in my opinion the said transaction is based factual aspects. The appreciation of such facts by the trial Court and the First Appellate Court, if concurrent normally it should not be disturbed, unless the said appreciation by the courts is without there being any evidence or it is only on the basis of imagination of the courts. Even the appreciation of the

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facts pleaded and evidence addressed by the parties is erroneous, if such erroneous findings is concurrent in nature then also this Court should not interfere with such appreciation of facts. The parties have in fact led the oral evidence with reference to their pleadings and the Courts below have appreciated the same. It is not pointed out before this Court that there is no evidence before the trial Court and the trial Court has imagined such evidence and given findings and drawn inference. It is also not pointed out to the Court that, there is a material evidence by the parties and the same has not been looked into or ignored by the trial Court and the First Appellate Court and drawn the inference as against the evidence. If such materials are not available, even erroneous findings on facts cannot be interfered by the Court, unless the Court itself finds that there is a miscarriage of justice by such erroneous appreciation in such manner. On careful perusal of the appreciation of the evidence by the both the Courts, I do not find any strong reason to come to any other conclusion except the one recorded by the trial Court and the First Appellate Court. It cannot be said that by means of such oral evidence the plaintiff has rebutted the strong presumption arising out of the sale deed executed in favour of the defendant No. 1. When once the sale deed is executed, it vests the complete right, title and interest over the property in favour of the plaintiff. In order to divest the said vested right, there must be impeccable un-controverted materials on record which are conspicuously absent in the case.

RELINQUISHMENT OF RIGHT ONLY THROUGH REGISTERED DOCUMENT

Sneh Gupta v. Devi Sarup and others [(2009) 6 SCC 194] It is also not a case where the compromise can be said to be a family arrangement. A family arrangement must be entered into by all the parties thereto. Compliance of the requirements laid down in Order XXIII, Rule 3 of the Code of Civil Procedure is imperative in character. A compromise or satisfaction must satisfy the conditions of a lawful agreement. ..... Title to a property must be determined in terms of the statutory provision.

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If by reason of the provisions of the Hindu Succession Act, 1956 the appellant herein had derived title to the property along with her brothers and sisters, she cannot be deprived thereof by reason of an agreement entered into by and between the original plaintiff and the contesting defendants. If a party furthermore relinquishes his or her right in a property, the same must be done by a registered instrument in terms of the provisions of Indian Registration Act.

WHETHER NOT FILING A DOCUMENT IN REBUTTAL OF A DOCUMENT AMOUNTS TO AN ADMISSION

Union Of India vs Ibrahim Uddin & Anr on 17 July, 2012 , Dr. B. S. CHAUHAN, J., The question does arise as to whether not filing a document in rebuttal of a document amounts to an admission and whether the provisions of Section 58 of the Evidence Act are attracted. Order XII CPC deals with admission of the case, admission of the documents and judgment on admissions. Rule 1 thereof provides that a party to a suit may give notice by his pleading or otherwise in writing that he admits the truth of the whole or any party of the case of any other party. Rule 2 deals with notice to admit documents – it provides that each party may call upon the other party to admit within 7 days from the date of service of the notice of any document saving all such exceptions. Rule 2A provides that a document could be deemed to have been admitted if not denied after service of notice to admit documents.

Admission is the best piece of substantive evidence that an opposite party can rely upon, though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous. Admission may in certain circumstances, operate as an estoppel. The question which is needed to be considered is what weight is to be attached to an admission and for that purpose it is necessary to find out as to whether it is clear, unambiguous and a relevant piece of evidence, and further it is proved in accordance with the provisions of the Evidence Act. It would be appropriate that an opportunity is given to the person under cross-examination to

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tender his explanation and clear the point on the question of admission. (Vide: Narayan Bhagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi & Ors., AIR 1960 SC 100; Basant Singh v. Janki Singh & Ors., AIR 1967 SC 341; Sita Ram Bhau Patil v. Ramchandra Nago Patil, AIR 1977 SC 1712; Sushil Kumar v. Rakesh Kumar, AIR 2004 SC 230; United Indian Insurance Co Ltd. v. Samir Chandra Choudhary., (2005) 5 SCC 784; Charanjit lal Mehra & Ors v. Kamal Saroj Mahajan & Anr., AIR 2005 SC 2765; and Udham Singh v. Ram Singh & Anr., (2007) 15 SCC 529.)

In Nagubai Ammal & Ors. v. B.Shama Rao & Ors., AIR 1956 SC 593, Court held that admission made by a party is admissible and best evidence, unless it is proved that it had been made under a mistaken belief. While deciding the said case reliance has been placed upon the judgment in Slatterie v. Pooley, (1840) 6 M & W 664, wherein it had been observed "What a party himself admits to be true, may reasonably be presumed to be so."

In L.I.C of India & Anr v. Ram Pal Singh Bisen, (2010) 4 SCC 491, Court held that "failure to prove the defence does not amount to an admission, nor does it reverse or discharge the burden of proof of the plaintiff."

In view of the above, the law on the admissions can be summarised to the effect that admission made by a party though not conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be erroneous. Even if the admission is not conclusive it may operate as an estoppel. Law requires that an opportunity be given to the person who has made admission under cross-examination to tender his explanation and clarify the point on the question of admission. Failure of a party to prove its defence does not amount to admission, nor it can reverse or discharge the burden of proof of the plaintiff.

In the instant case, the Court held that not filing any document in rebuttal of the Will dated 1.3.1929 amounts to admission of the said Will as well as it contents. Without following

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the procedure as required under Order XII CPC or admission having not been made during the course of hearing before the Court, the question of application of Section 58 of the Evidence Act could not arise. Section 58 provides that a fact may not need to be proved in any proceeding which the parties thereto agreed to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands or which they admitted by their pleading, even in that case court may, in its discretion, even if such a admission has been made by the party, require the fact admitted to be proved otherwise than by such admission. In fact, admission by a party may be oral or in writing. `Admissions' are governed under Sections 17 to 31 of the Evidence Act and such admission can be tendered and accepted as substantive evidence. While admission for purposes of trial may dispense with proof of a particular fact. Section 58 deals with admissions during trial i.e. at or before the hearing, which are known as judicial admissions or stipulations dispense it with proof. Admissions are not conclusive proof but may operate as estoppel against its maker. Documents are necessarily either proved by witness or marked on admission.

In view of above, it is evident that the first appellate court has misdirected itself so far as the issue of admission is concerned. The finding recorded by it that appellant/defendant No.1 failed to produce any document in rebuttal of the Will is not only wrong but preposterous.

PROPER APPRECIATION OF DOCUMENTS AND EVIDENCE

THE HON'BLE MR. JUSTICE SUBHASH B. ADI of Karnataka High Court in the case of **R Laxman vs M S Lingegowda Since Dead By Lrs** Decided on 13 February, 2013

No doubt, the pleadings in the plaint do not show that the plaintiff has stated the source of his title to the suit schedule property. The entire pleadings show that the plaintiff has based his claim only on the basis of the revenue records. However, during the course of his evidence, he sought to produce Ex.P20, which stands in the name of the uncle of the plaintiff and he claimed that, there was subsequent partition and the suit schedule property had fallen to

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his share, however, such a pleading is not forthcoming in the plaint. ……. However, the plaintiff admittedly, has produced Exs.P1 to P6 and it shows the plaintiff`s name in the cultivator`s column and in the kabzedar`s column, the name of the brother of the plaintiff is shown. Under Section 133 of the Karnataka Land Revenue Act, the entries in the revenue records create presumption that they are true, unless rebuttable evidence is led. Ex.D2 is a pahani, wherein the name of defendant No.4, one of the legal representatives of the original defendant is shown in the cultivator`s column. It is not known as to how for the first time in 1982-1983, the name of defendant No.4 is entered. ……. The trial Court, without referring to the entries in the said documents and without referring to Survey Nos., only on the ground that there was an order passed by the Appellate Tribunal against the brother of the plaintiff, has dismissed the suit. ……. In my opinion, the trial Court has utterly failed to appreciate the evidence on record in the proper perspective. When there is a dispute between the parties, the better title between the parties has to be ascertained and to appreciate the same, the trial Court should have looked into the oral as well as the documentary evidence of both the parties. Even the documents referred to by the trial Court have been wrongly understood.

DOCUMENT INSUFFICIENTLY STAMPED CANNOT BE PERMITTED TO BE USED EVEN FOR COLLATERAL PURPOSE

JUSTICE B. Padmaraj, of Karnataka High Court, in the case of **Jayalakshmi Reddy vs Thippanna And Ors.** Reported in **ILR 2002 KAR 5163, 2003 (5) KarLJ 263** "……..Document, which is insufficiently stamped, cannot be permitted to be used for collateral purpose in view of Section 34 of the Karnataka Stamp Act which clearly prescribes that no instrument chargeable with duty shall be admitted in evidence for any purpose. The instrument in question is an agreement of sale dated 4-11-1995 between the parties viz., the vendor and vendee, whereunder the vendor agreed to sell his immovable property for a consideration of Rs. 15,000/- and received thereunder a sum of Rs. 14,500/- and where in part performance of the contract, possession of the immovable property is delivered. Thus, the instrument in question

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fully satisfies the conditions of Article 5(e)(i) and hence, the stamp duty payable on conveyance is to be demanded and paid in view of the said Article 5(e)(i). The instrument covered by Article 5(e)(i) is treated as a conveyance and the proper stamp duty payable thereon is the same as a conveyance (No. 20) on the market value of the property and the Expla7 nation (II) only says that where subsequently, conveyance is executed, the stamp duty already paid or recovered on the agreement shall be adjusted and it does not in any way gives an option to the party to pay the stamp duty subsequently. On the other hand Article 5(e)(i) clearly indicates that the proper duty is to be paid at the stage of agreement itself if it satisfies the conditions thereof. Having considered the agreement as a whole in the light of Article 5(e)(i) of the Karnataka Stamp Act, I am of the view that it can be regarded as a conveyance as the instrument in question is covered by Article 5(e)(i) for which the proper duty payable under the Karnataka Stamp Act is the same duty as a conveyance (No. 20) on the market value of the property. In the instant case, the proper stamp duty payable under the Karnataka Stamp Act being not paid and when the document was sought to be used in evidence, the Court below was justified in passing the impugned order which cannot be found fault with. Hence, it needs no interference."

DOCUMENT WHICH IS REGISTRABLE AND NOT TRANSACTION

Deb Dutt Seal v. Raman Lal, AIR 1970 SC 659 wherein the Hon'ble Supreme Court has held that it is on the construction of the document wherein it requires registration or not. The Hon'ble Supreme Court observed that in order to require registration, document must contain all the essentials of transaction and one essential is that the title deeds contain all essential of transaction. According to the Hon'ble Supreme Court it is a document which is registrable under the Registration Act and not a transaction.

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Government of Uttar Pradesh v. Mohammad Amir Ahmad Khan AIR 1961 SC 787. That was a case where the question arose whether the Collector had any power to impound an instrument sent to him for adjudication under Section 31 of the Stamp Act. The Supreme Court held that under that section, the Collector had no such power, as under Section 31 of the Stamp Act, the Collector could only give his opinion as regards the duty, with which, in his judgment, the instrument was chargeable and once that duty was performed by the Collector, he would become functus officio.

THE REGISTERED DOCUMENT WILL OPERATE, NOT FROM THE DATE OF ACTUAL REGISTRATION, BUT FROM THE DATE WHEN THE DEED WAS EXECUTED

JUSTICE R Raveendran, JUSTICE K Manjunath in the case of Veerabhadrappa And Anr. vs Jagadishgouda ILR 2003 KAR 3042, 2002 (5) KarLJ 55 It is well-settled that when a document is duly presented for registration (within the time prescribed), if its registration is refused or if its registration is kept pending, and thereafter the document is registered either on the direction of the Registrar or competent Court or on the Sub-Registrar satisfying himself that there is no impediment for registration, the registered document will operate, not from the date of actual registration, but from the date when the deed was executed. This principle can be gathered from the provisions of the Registration Act, 1908 (Sections 47 and 75) and several decisions the earliest of which are that of the Madras High Court in the case of Venkatarama Reddi v. Pillati Rama Reddy, ILR 1916(40) Mad. 204 and of the Privy Council in the case of Chhotey Lal v. Collector of Moradabad, AIR 1922 PC 279 : ILR 1922(44) All. 514. A learned Single Judge of this Court in the case of Azeezulla Sheriff alias Anwar Pasha and Ors. v. Bhab-huthimul, 1972(2) Mys. L.J. 408 : AIR 1973 Mys. 276, held thus: "Sub-section (3) of Section 75, only determines the deemed date of registration in respect of documents compulsorily registered in pursuance of an order made under Section 75(1). Sub-section (3) of Section 75 does not deal with the effect of registration of a document. That topic is dealt with by Section 47

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which states that once a document is registered, it shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its -registration. The expression "not from the time of its registration" used in Section 47 makes it clear that the date of registration, whether actual or the deemed date under Section 75(3), has no relevance whatsoever for determining the time from which the registered document operates. Once the document is registered, whether it is on admission of execution under Section 35 or by way of compulsory registration under Part XII of the Act, the provisions of Section 47 are attracted for the purpose of determining the time from which the registered document operates". This was reiterated in the case of Rathnakar v. H.S. Madhava Rao and Ors., 1990(4) Kar. L.J. 541 : ILR 1991 Kar. 2190

JUSTICE R Raveendran, JUSTICE K Manjunath in the case of Veerabhadrappa And Anr. vs Jagadishgouda ILR 2003 KAR 3042, 2002 (5) KarLJ 55 When registration of a document is ordered to be kept pending, or when registration of a document is refused, and subsequently such document is ordered to be registered, such registration takes effect as if the document had been registered when it was first duly presented for registration. That would mean that the registration relates back to the date of execution. The well-settled principle is that if there is a competition between registered documents relating to the same property, the document first in order of time has priority over the other, though the former document may not have been registered until after the latter.

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JUSTICE R Raveendran, JUSTICE K Manjunath in the case of Veerabhadrappa And Anr. vs Jagadishgouda ILR 2003 KAR 3042, 2002 (5) KarLJ 55 The role played by the Sub-Registrar in registering a document is rather limited. He has no power or authority to examine the rival claims as to whether a sale deed presented for registration is really a sale deed or not, nor is he

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empowered to grant any declarations in regard to binding nature of documents.

NO DIRECTION CAN BE ISSUED TO THE SUB-REGISTRAR NOT TO REGISTER THE DOCUMENT

Justice B Singh, Justice J Shety In S. Sreenivasa Rao v. The Sub-Registrar (Headquarters), Mysore, **ILR 1990 KAR 3740, 1990 (2) KarLJ 258** Court held that if the provisions of the Registration Act and Rules and other laws are complied with, the Sub-Registrar is bound to register the document and no direction can be issued to the Sub-Registrar not to register the document. It was also held that if any person is interested in contending that the registered document is invalid or illegal for any reason, he has to question the validity before the proper forum in appropriate proceedings. .... We also find no provision in the Registration Act, 1908 which obliges the Sub-Registrar to act upon any such direction and/or to investigate at the stage of registration of a document itself, the title of the party executing the document. We are, therefore of the view that if a document is presented for registration by the executant, and in doing so, the executant complies with all the provisions of Registration Act, 1908, it is not open to the Sub-Registrar to refuse registration of the document unless he exercises that discretion pursuant to any provision in the Registration Act, 1908 or any other law or Rule having the force of law. The mere registration of a document is by itself not a proof of its validity, neither does it follow that the executant had title to the property, he seeks to dispose of under the document. Matters such as relating to title have to be decided before the appropriate forum. If any person is interested in contending that any particular document executed and registered under the Registration Act, 1908 is invalid or illegal for any reason whatsoever, he !s certainly at liberty to question the validity of the document, the title of the executant, and such other questions before the proper forum in an appropriate proceeding."

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Rule 145 of the Karnataka Registration Rules, provides thus: "Protests against registration of documents.--The Registering Officer should not entertain any petition protesting against registration of document. Such petitions, when insisted should be received and returned immediately with an appropriate endorse ment and no record should be kept in the office. Since these petitions are not to be filed, their copies cannot be granted".

SUB-REGISTRAR CANNOT GO INTO QUESTION OF TITLE AND GENUINENESS OF DOCUMENTS

Justice V G Gowda in the case of Sulochanamma vs H. Nanjundaswamy 2001 (1) KarLJ 215 The Sub-Registrar was entrusted with the duty of registering the documents in accordance with the provisions of the Act and he was not authorised to go into the genuineness or otherwise of the documents presented before him. If the documents are bogus or false, the party affected by it will have the right to initiate both civil and criminal proceedings to prosecute the party who tries to have benefit from such document and also to safeguard his right, title and interest. It was not for either the Tahsildar or the Sub-Registrar to express opinion as to the genuineness or otherwise of the documents unless called upon by the Court of law or any other authorised investigating agency. There was no occassion for the Sub-Registrar to refer the document to the Tahsildar when presented for the purpose of registration. Thus, both the Tahsildar and the Sub-Registrar have exceeded their jurisdiction in the matter in submitting his report regarding registration of the document and upon such report the second respondent should not have made an endorsement on the document and refused to register the document by him.

CERTIFIED COPY OF A DOCUMENT NEED NOT BE PROVED BY CALLING WITNESS

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The document being a certified copy of a public document need not proved by calling a witness (vide Madamanchi Ramappa v. Muthaluru Bojjappa AIR 1963 SC 1633).

SUIT FOR CANCELLATION OF INSTRUMENT BY A PERSON WHO DID NOT EXECUTE THE DOCUMENT WOULD NOT LIE

A Full Bench of Madras High Court in Muppudathi v. Krishnaswami AIR 1960 Madras 1 (F.B.) when the instrument/document is not executed by the plaintiff, the same does not create a cloud upon the title of the true owner nor does it create apprehension that it may be a source of danger. Accordingly, a suit for cancellation of instrument by a person who did not execute the document would not lie. However, there could be cases where instruments are executed or purported to be executed by a party or by any person who can bind him in certain circumstances. As pointed out by the Madras High Court, these are : a party executing the document or principal in respect of a document executed by his agent, or a minor in respect of document executed by his guardian de jure or de facto, the reversioner in respect of a document executed by the holder of the anterior limited estate, a real owner in respect of a document executed by a benamidar. In these cases, though the party may not have executed document, if those are allowed to stand, it may become a potential source of mischief and danger to the title and a suit would, therefore, be maintainable for cancellation of such document. When the document itself is not executed by the plaintiff, there is no necessity to have the document cancelled by a Court decree, for it has no effect on the title of true owner.

EFFECT OF REGISTRATION OF DOCUMENT

Honourable Apex Court in SURAJ LAMP & INDUSTRIES (P) LTD. vs. STATE OF HARAYANA [(2009) 7 SCC 363]. The following passage is apposite: "18.Registration provides safety and security to transactions relating to immovable property, even if the document is lost or destroyed. It gives publicity and public

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exposure to documents thereby preventing forgeries and frauds in regard to transactions and execution of documents. Registration provides information to people who may deal with a property, as to the nature and extent of the rights which persons may have, affecting that property. In other words, it enables people to find out whether any particular property with which they are concerned, has been subjected to any legal obligation or liability and who is or are the person(s) presently having right, title, and interest in the property. It gives solemnity of form and perpetuate documents which are of legal importance or relevance by recording them, where people may see the record and enquire and ascertain what the particulars are and as far as land is concerned what obligations exist with regard to them. It ensures that every person dealing with immovable property can rely with confidence upon the statements contained in the registers (maintained under the said Act) as a full and complete account of all transactions by which the title to the property may be affected and secure extracts/copies duly certified."

SETTLEMENT DEED

A.Sreenivasa Pai and another v. Saraswathi Ammal alias G. Kamala Bai, AIR 1965 SC 1359 in which the Supreme Court considered the document to be a settlement deed and held that the death of the ultimate beneficiary during the life time of the life estate holder will not have the effect of defeating the right which had already vested on the beneficiary.

IF AGREEMENT HAVING DOUBLE MEANING ONE WHICH IS LAWFUL SHOULD BE PREFERRED

Hon'ble Supreme Court in the case of Delta International Ltd. vs. Shyam Sundar Ganeriwalla and Another reported in MANU/SC/0258/1999 : (1999) 4 SCC 545 wherein it has been held that the intention of the parties is the meaning of the words used where terms of the agreement are vague or having double meaning one which is lawful should be preferred.

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REQUIREMENT OF ONE ATTESTING WITNESS TO PROVE A DOCUMENT

Rosammal Issetheenammal Fernandez (dead) by Lrs and others v. Joosa Mariyan Fernandez and others) AIR 2000 Supreme Court 2857 wherein the Apex Court has held '9. ... The main Part of Section 68 of the Indian Evidence Act puts on obligation on the party tendering any document that unless at lest one attesting witness has been called for proving such execution the same shall not be used in evidence'.

ONCE DOCUMENT IS ADMITTED SUCH ORDER IS FINAL

Hon'ble Supreme Court in AIR 1961 SC 1655 (Javer Chand v. Pukhraj Surana) that; “Once a document has been marked as an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, S.36 comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the trial court itself or to a Court of Appeal or Revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction.”

DUTY OF COURT TO EXAMINE PROBATIVE VALUE OF EVERY DOCUMENT

Apex Court in H.Siddiqui v. A. Ramalingam (2011 (4) SC 240) `Admissibility of a document is one thing and its positive value quite another these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil ..... Therefore, it is the

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duty of the Court to examine whether documents produced in the Court or contents thereof have any probative value.

In State of Bihar and Ors. v. Sri Radha Krishna Singh & Ors., AIR 1983 SC 684, held as under: “Admissibility of a document is one thing and its probative value quite another - these two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and the weight of its probative value may be nil.” .....Where a report is given by a responsible officer, which is based on evidence of witnesses and documents and has “a statutory flavour in that it is given not merely by an administrative officer but under the authority of a Statute, its probative value would indeed be very high so as to be entitled to great weight. The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety is precious little.”

In Madan Mohan Singh & Ors. v. Rajni Kant & Anr., AIR 2010 SC 2933, Court examined a case as a court of fifth instance. The statutory authorities and the High Court has determined the issues taking into consideration a large number of documents including electoral rolls and school leaving certificates and held that such documents were admissible in evidence. This Court examined the documents and contents thereof and reached the conclusion that if the contents of the said documents are examined making mere arithmetical exercise it would lead not only to improbabilities and impossibilities but also to absurdity. This Court examined the probative value of the contents of the said documents and came to the conclusion that Smt. Shakuntala, second wife of the father of the contesting parties therein had given birth to the first child two years prior to her own birth. The second child was born when she was 6 years of age; the third child was born at the age of 8 years; the fourth child was born at the age of 10 years; and she gave birth to the fifth child when she was 12 years of age. Therefore, it is the duty of the court to examine whether documents produced in the Court or contents thereof have any probative value.

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DOCUMENT AND ITS LEGAL CONSTRUCTION

Supreme Court in the case of Subbegowda (Dead) by Lr. v. Thimmegowda (Dead)by Lrs., **JT 2004 (5) SC 274**, has held that the question of considering construction of a document is to be decided by finding out the intention of the executant, firstly from a comprehensive reading of the terms of the document itself, and the other circumstances on the basis of which the document is executed. It has been held by the Supreme Court that when the intention is clear then the construction of the document has to be done in such a manner that the intention of the parties are given effect to. If the document in hand is considered in the light of the aforesaid, it has to be held that it is a conveyance transferring right of the property and possession to the petitioner.

Mushir Mohammed Khan v. Sajida Bano **AIR 2000 SC 1085** was not the case related to one composite document. It was a case of three documents viz. Sale Deed, Agreement of recovenyance and Rent Note.

In Tamboli Raman Lal Moti Lal v. Ghanchi Chiman Lal Keshavlal **AIR 1992 SC 1236,** there was no relationship of debtor and creditor between the parties as is existed in the instant case.

Supreme Court has in Ram Gopal v. Nand Lal, AIR 1951 SC 139 stated the fundamental rule which should govern the courts while ascertaining the intention of the parties as thus (at p, 141, Para 7): "In construing a document, whether in English or in vernacular, the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered but that is only for the purpose of finding out the intended meaning of the words which have actually been employed".

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Channamallappa and Ors. vs. Sou. Channawwa and Ors.: MANU/KA/0571/2021 - It is settled principle of law that the right and title in an immovable property worth more than Rs. 100/- cannot be transferred without a registered document as required under section 17 of the Registration Act, 1908. It is also settled principle that mere entry in a mutation would not create any right or title in an immovable property. Therefore, this document Ex. P.6 would not convey any transfer of title to the defendants to the extent of 20 guntas each. Ex. P.7 is an unregistered document styled as 'Kutumba Vyavastha Patra'. The contents of the said document also indicate that it is a transfer.

Nil Kumar Dahal and Ors. vs. Indira Dahal and Ors.: MANU/SI/0068/2020 - .....under the Mitakshara School of Hindu Law, each son and now daughters vide the Hindu Succession (Amendment) Act, 2005, in Section 6, are coparceners in their own right and upon birth, take an equal interest in the ancestral property, whether movable or immovable. Thus, being entitled to a share, they can seek partition. If they do so, the effect in Law is not only a separation of the father from the sons but a separation inter se, the consent of the sons is not necessary for the exercise of that power. However, no Hindu father joined with his sons and governed by the Mitakshara Law although vested with the power to partition the property can make a partition of the joint family property by Will. In Kalyani (Dead) by Lrs. v. Narayanan and Others MANU/SC/0298/1980 : 1980 Supp SCC 298, the Hon'ble Supreme Court has propounded this principle. Once partition is complete, the property then becomes the separate property of each of the coparceners, however, in the hands of the son, the property will be ancestral property and the natural or adopted son of that son will take interest in it and be entitled to it by survivorship and joint family property. [See Mullah's Hindu Law, 22nd Edition, Chapter XII]. The Hon'ble Supreme Court in C.N. Arunachala Mudaliar v. C.A. Muruganatha Mudaliar and Another MANU/SC/0090/1953 : AIR 1953 SC 495 considered the question as to where a Hindu, instead of requiring his self-acquired or separate property to go by descent, makes a gift of it to his son, or

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bequeaths it to him by Will, whether such property is the separate property of the son or whether it is ancestral in the hands of the son as regards his male and female issues. It was observed that if there are no clear words describing the kind of interest intended to be given, the Court would have to collect the intention from the language of the document, taken along with the surrounding circumstances in accordance with the established cannons of construction.

INTERPRETATION OF DOCUMENT - WHERE AN ABSOLUTE TITLE IS GIVEN IN CLEAR AND UNAMBIGUOUS TERMS AND THE LATER PROVISIONS TRENCH ON THE SAME, THAT THE LATER-PROVISIONS HAVE TO BE HELD TO BE VOID

Decision reported in A.I.R 1963 S.C 890 1. Ramakishorelal and Anr. v. Kamalnarayan, which was followed in . The principle settled therein reads thus: "The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words in their ordinary, natural sense. To ascertain his intention, a Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has, to a trained conveyancer a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyancing. Sometimes it happens in the case of documents as regards disposition of properties, whether they are testamentary or non-testamentary instruments, that there is clear conflict between what is stated in one part of the document and in another. In cases of such a conflict the earlier disposition of absolute title should prevail and the later direction of disposition should be disregarded as unsuccessful attempt to restrict the title already given. It is clear, however that an attempt should always be made

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to read the two parts of the document harmoniously, if possible; it is only when this is not possible e.g. where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, that the later-provisions have to be held to be void."

Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd. And Others MANU/SC/0073/1987 : (1987) 1 SCC 424, it was inter alia observed as under; "33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place....."

Anwar Hasan Khan v. Mohd. Shaft and Others MANU/SC/0676/2001 : (2001) 8 SCC 540, the Hon'ble Supreme Court inter alia held thus; "8. ..... It is a cardinal principle of construction of a statute that effort should be made in construing its provisions by avoiding a conflict and adopting a harmonious construction. The statute or rules made thereunder should be read as a whole and one provision should be construed with reference to the other provision to make the provision consistent with the object sought to be achieved."

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RELEASE DEED RELEASES RIGHTS WHICH WERE CONTEMPLATED IN THE DEED

In CHINNATHAYI v. KULASEKHARA PANDIYA NAICKER AND ORS. 1952 AIR 29, 1952 SCR 241 , the Supreme Court has stated the principle "It is well settled that general words of a release do not mean release of rights other than those then put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed."

SUIT FOR CANCELLATION OF DOCUMENT

Prem Singh and Others vs. Birbal and Others, (2006) 5 SCC 353. In this case, while writing the Judgment on behalf of the Division Bench, His Lordship the Hon'ble Mr.JUSTICE S.B.SINHA at Paragraph Nos.14 to 16 has held as under: 14. A suit for cancellation of instrument is based on the provisions of Section 31 of the Specific Relief Act, which reads as under: "31. When cancellation may be ordered.-(1) Any person against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable and the court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. (2) If the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation."…….15. Section 31 of the Specific Relief Act, 1963 thus, refers to both void and voidable documents. It provides for a discretionary relief. …… 16. When a document is valid, no question arises of its cancellation. When a document is void ab initio, a decree for setting aside the same would not be necessary as the same is non est in the eye of the law, as it would be a nullity."

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DOCUMENT SHOULD BE READ AS A WHOLE FOR ITS INTERPRETATION

Syed Abdulkhader vs Rami Reddy & Ors 1979 AIR 553, 1979 SCC (2) 601 A document will be considered as a whole for interpretation of particular words or directions. An ordinary authority given in one part of the instrument will not be cut down because there are ambiguous and uncertain expressions elsewhere. A power of wide amplitude conferring wide authority cannot by construction be narrowed down to deny an authority which the donor expressly wanted to confer.

The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used.

Constitution bench in Ramkishore Lal vs. Kamal Narain: MANU/SC/0022/1962 - AIR 1963 SC 890 Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has, to a trained conveyancer, a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyancing. Sometimes it happens in the case of documents as regards disposition of properties, whether they are testamentary or non-testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same

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property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens ? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. (See Sahebzada Mohd. Kamgar Shah v. Jagdish Chandra Deo Dhabal Deo) MANU/SC/0246/1960 : [1960]3SCR604 . It is clear, however, that an attempt should always be made to read the two parts of the documents harmoniously, if possible. It is only when this is not possible, e.g., where an absolute title is given is in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void.

Gurubasappa And Ors. vs Gurulingappa AIR 1962 Mys 246, ILR 1961 KAR 878 In deciding this question, it would be necessary to consider the true scope and effect of sections 91 and 92 of the Evidence Act. Chapter VI of the Evidence Act which begins with section 91 deals with the exclusion of oral evidence by documentary evidence, section 91 of the Act provides: "When the terms of a contract, or a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained". The normal rule is that the contents of a document must be proved by primary evidence which is the document itself in original. Section 91 is based on what is described as best evidence rule. The best evidence about the contents of a document is the document itself and it is the production of the document that is required by section 91 in proof of its contents. In a sense the rule enumerated by section 91 can be said to be an exclusive rule inasmuch as it excludes the admission of oral evidence for proving the contents of a document except in cases where secondary evidence is allowed to be led under the relevant provisions of the Evidence Act. Section 92 of

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the Evidence Act runs as follows: "When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms". It is manifest that section 92 excludes the evidence of oral agreement and it applies to cases where the terms of a contract, grant or other disposition of property have been proved by the production of the relevant documents themselves under section 91 of the Act. In other words, after the document had been produced to prove its terms under section 91, the provisions of section 92 of the Act come into operation for the purposes of excluding the evidence of any oral agreement or the statement for the purpose of contradicting, varying, adding to or subtracting from its terms. It would be noticed that sections 91 and 92 are in effect supplementary to each other. Section 91 would be frustrated without the aid of section 92 and section 92 would be inoperative without the aid of section 91. Since section 92 excludes the admission of oral evidence for the purpose of contradicting, varying, adding to or subtracting from the terms of the document properly proved under section 91, it may be said that it makes the proof of the document conclusive of its contents. Like section 91, section 92 can be said to be based on best evidence rule.

Bhinka And Others vs Charan Singh 1959 AIR 960, 1959 SCR Supl. (2) 798 " The Court shall presume to be genuine every document purporting to be a certificate..... which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer -of the Central Government or of a State Government..... Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper ". Under this section a Court is

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bound to draw the presumption that a certified copy of a document is genuine and also that the officer signed it in the official character which he claimed in the said document. But such a presumption is permissible only if the, certified copy is substantially in the form and purported to be executed in the manner provided by law in that behalf.

C.H. Shah vs S.S. Malpathak And Ors. AIR 1973 Bom 14, Section 79 only raises a rebuttable presumption with regard to the genuineness of certified copies and that too only if they are executed substantially in the form and in the manner provided by law. .....Section 79, as laid down by the Supreme Court in Bhinka's case already referred to above it must be shown that the certified copy was executed substantially in the form and in the manner provided by law. There would, therefore, be a check or safeguard in so far as the officer certifying it in the manner required by law would have to satisfy himself in regard to the authenticity of the original and in regard to the accuracy of the copy which he certifies to be a true copy thereof. On the other hand if the original of a public document is to be admitted in evidence without proof of its genuineness, there would be no check whatever either by way of scrutiny or examination of that document by an officer or by the Court.

SOME BRIEF CITATION POINTS ON DOCUMENTS

- Non mentioning of survey number will not render the mother document void so also the area of the subject matter. Mithukhan case: AIR 1986 MP 39.

- If the language employed has ambiguities to enter into it, then intention of the parties has to be gathered by overall survey of the contents of the document in question. P.L.Bapuswami case: AIR 1966 SC 902.

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- If a document is relatively 30 years old and was obtained from proper custody, then its contents have to be presumed genuine. Smt Anika B. case: AIR 2005 MP 64.

- Just by name true nature of document cannot be disguised nor be treated otherwise. AIR 1958 SC 532.

- For clear identification of any immoveable property, the deed should be very clear about the schedule or boundaries of the property. If the boundaries are disputed, their description resolves the dispute. M. Dhondusa Religious and Charitable Trust case: ILR 2002 Kar 4832.

- If one interpretation could give effect to all parts of the deed and other renders some clauses nugatory, then, the interpretation that gives effect to all clauses should be preferred. Radha Sundar Dutta case: AIR 1959 SC 24. D.D.A. case: AIR 1973 SC 2609.

- In case of contradictions in statements of document about area and boundaries the boundaries shall prevail. M/S Roy &co case: AIR 1979 Cal 50.

- In case of contradictions between the map and mother deed, the mother deed should prevail. Narain Prasad Singh case: AIR 1983 Pat 244.

- In case of ambiguity with regard to description of property, description as can be ascertained from the boundaries will settle the issue. Babji Dehuri case: AIR 1996 Ori 183.

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- In case of contradictions between description and boundaries regarding location of the property, the boundaries shall prevail. Tranglaobi pisiculture co-op soc ltd case: AIR 1969 Mani 84.

- Plan appended to a document forms part of that document. If a plan is so appended, extent cannot be determined solely based on measurements ignoring the map. Sumathy Amma case: AIR 1987 Ker 84.

- Ownership of surface of the land confers ownership of every thing beneath the land unless a reservation was made by transferor while transferring the ownership. Raja Anand Brahma Shah case: AIR 1967 SC 1081. Sukhdeo Singh case: AIR 1951 SC 288.

- Unless other wise provided by the recitals, trees standing on the land will also pass along with the land. DFO sarahan forest division H.P.case: AIR 1968 SC 612.

- In construing a contract the court must look at the words used in the contract unless they are such that one may suspect that they do not convey the intention correctly. ONGC ltd case: AIR 2003 SC 2629.

- Where there is a documentary evidence, oral evidence is not entitled to any weight. Murarka Properties (p) ltd AIR 1978 SC 360.

- While interpreting the document the document in question should be read as a whole. Therefore , if one clause of the

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document is invalid or otherwise, that one clause itself will not render the whole document invalid. AIR 1956 SC 46.

- It is common knowledge that laymen do not know nor care about the niceties of drafting. They cannot be expected to possess the expertise of a professional. Therefore, techinical rules that are generally applied to the provisions of law and exceptions should not be applied while interpreting such documents or deeds. AIR 1951 SC 293.

- The cardinal rule of construction is that a document must be read as a whole, each clause being read in relation to the other parts of the document, and an attempt should be made to arrive at an interpretation which will harmonize and give effect to other clauses thereof. It is not legitimate to pick out an expression torn from its context and try to interpret the document as a whole in the light of that expression. Such a forced construction on the document in question cannot defeat the very object which its executants had in view. Shri Digambar Jain and others case: AIR 1970 MP 23(26) [FB].

- Where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, the later provisions have to be held to be void. Ramkishorelal case: AIR 1963 SC 890.

- It is well settled that general words of release do not mean release of rights other than those put up and have to be limited to the circumstances which were in the contemplation of the parties when it was executed. Rajagopal Pillai and another case AIR 1975 SC 895.(897).

- In construing documents usefulness of the precedents is usually of a limited character, after all the courts have to

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consider the material and relevant terms of the document with which they are concerned and it is on a fair and reasonable construction of the terms that the nature and character of the transaction evidenced by it has to be determined. Trivenibai case: AIR 1959 SC 620(622).

- The obligations in the deed which is in the nature of trust is an obligation which can be specifically enforced. Bai Dosabai Mathurdas Govinddas and others case: AIR 1980 SC 1334.

INTENTION MUST PRIMARILY BE GATHERED FROM THE MEANING OF THE WORDS USED IN THE DOCUMENT

In Delta International Limited v. Shyam Sundar Ganeriwalla & Anr., AIR 1999 SC 2607, this Court held that the intention of the parties is to be gathered from the document itself. Intention must primarily be gathered from the meaning of the words used in the document, except where it is alleged and proved that the document itself is a camouflage. If the terms of the document are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for the purpose of ascertaining the real relationship between the parties. If a dispute arises between the very parties to the written instrument, then intention of the parties must be gathered from the document by reading the same as a whole.

In Vodafone International Holdings B.V v. Union of India & Anr., (2012) 6 SCC 613, while dealing with a similar situation, this Court held: "The Court must look at a document or a transaction in a context to which it properly belongs to. While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series

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of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so in not to prefer form to substance, or substance to form. It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions intended to operate as such, it is that series or combination which may be regarded."

T.L. Nagendra Babu vs Manohar Rao Pawar ILR 2005 KAR 884
Presumption operates in favour of the party relying on a document, provided he must prove that the document is duly executed and authenticated.

INTERPRETATION OF A DOCUMENT

The principle of interpretation of a document is laid down by the Apex Court in its judgment in the case of Kamla Devi v. Takhatmal and another, reported in AIR 1964 SC 859. The relevant portion contained in para 8 of the said judgment is reproduced below : "8. ... Section 94 of the Evidence Act lays down a rule of interpretation of the language of a document when it is plain and applies accurately to existing facts. It says that evidence may be given to show that it was not meant to apply to such facts. When a Court is asked to interpret a document, it looks at its language. If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the intricacies of the human mind to a certain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions. Sometimes when it is said that a Court should look into all the circumstances to find an author's intention, it is only for the purpose of finding out whether the words apply, accurately to existing facts. But if the words are clear in the context of the surrounding circumstances, the Court cannot rely on them to

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attribute to the author an intention contrary to the plain meaning of the words used in the document. ..."

Cheedella Radhakrishna Sharma and Ors. vs. Radhakrishnamurthy and Ors.: MANU/AP/2751 /2014 - Coming to the law on proof of documents and contents vis-à-vis interpretation and construction of deeds & documents-in particular testamentary, proof of due execution, attestation and contents, relevancy and admissibility-including for collateral purposes, probative value and presumptions: Interpretation is in fact a matter of communication of what wants to know and understand from what is said, in giving the meaning to the words of the document from mind of the person who has executed/written it, by reading of the document as a whole and not from nomenclature or pick and choose sentences-see also State of Orissa v. Titaghur Paper Mills Ltd., MANU/SC/0325/1985 : AIR 1985 SC1293. Interpretation is ascertaining the meaning and Construction is ascertaining the spirit.

15(a)(i). Coming to the proof: Once a document is properly admitted, the contents of those documents are also admitted in evidence, though those contents may not be treated as conclusive evidence-vide-P.C. Purushothama Reddiar v. Perumal MANU/SC/0454/1971 : AIR 1972 608. It is the settled law that the question of mode of proof is a question of procedure and is capable of being waived. It is to say when original not produced but copy of it for no objection raised after admissibility, the objection cannot later be raised being deemed waived; whereas proof of contents of the document is being substantive, the non-raising of objection is not a waiver vide R.V.E. Venkatachala Gounder v. A.V. & V.P. Temple MANU/SC/0798/2003 : AIR 2003 SC 4548 : 8 SCC 752. Following the above, it was also held in Dayamathi Bai v. K.M. Shaffi MANU/SC/0580/2004 : AIR 2004 SC 4082 : 7 SCC 107 that ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the

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admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit", an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court." Further, like an inadmissible evidence oral or documentary by consent cannot be made admissible by mere consent or no-objection while marking; what is not relevant under the Evidence Act, cannot in proceedings to which the Evidence Act applies, be made relevant by consent of parties. Thus, only admissible and

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relevant evidence can be brought on the record for consideration of the court without following the regular mode if parties agree. The reason behind this rule is that it would be unfair to ask any party to prove a particular fact when the other party has already admitted that the way it had been brought before the court has sufficiently proved it. Where, therefore, a party not only raised no objection to certain evidence being brought on record but indeed appeared to have invited the adjudicating authority to act on such evidence, it cannot be allowed later on to object to such evidence having been considered by such authority merely because the decision has gone against it-vide-Kalyan Peoples' Co-operative Bank Ltd. v. Dulhanbibi MANU/SC/0003/1962 : AIR 1966 SC 1072. Whereas in the case of Will unless it is proved of due execution by attestation as part of execution contemplated by Section 63 of the Indian Succession Act, of the requirement of testator must sign the Will in the presence of attestors or should personally acknowledge his signature in the presence of attestors, a Will is inadmissible and mere marking is not enough to admit even no objection raised vide Dr. M. Ratna v. Kottiboyina Navaneetham MANU/AP/0026/1994 : AIR 1994 AP 96. It is also held that without the statutory requirements of due execution of Will, it cannot be admitted vide Yumnum O.T.I. Devi v. Yumnum J.K. Singh MANU/SC/0366/2009 : 2009(4)SCC 780

15(a)(ii). Nature of Documents: Documents may contain either unilateral or bilateral dispositions or even with reciprocal. Further, testamentary or non-testamentary. Further, transfer of rights or division and separation of existing or joint rights. Further, any dispositions, transfer of rights or creating rights may be either present or future. Furthermore, it affects the rights of even non parties to the documents at times like in boundary recitals.

15(a)(iii). Construction of Documents/instruments: Generally in construing instruments, Court must have regard not only to the presumed intention of the parties but also to the meaning of the words which they have used-vide- V.S. Talwar v. Premchandra MANU/SC/0372/1984 : AIR 1984 SC 664 at para-7.

15(a)(iv). Interpretation of Documents: Every instrument has to be so interpreted as to accord with the intention of its maker having regard to the language used; though one cannot ignore

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actual words used and go after the supposed intention of maker, since that would amount to entering the arena of speculation, but all the same said principle is unexceptionable-vide-Hind Plastics v. Collector of Customs MANU/SC/0784/1994 : (1994) 5 SCC 167 at para-17.

15(a)(v). Coming to the admissibility and relevancy and probative value of recitals of the boundaries etc., in documents: Recital in a document of neighboring land, referring one of its boundary as suit land and it belongs to a particular person, for the person to rely on it, is not legal evidence and the same is not even admissible under Section 32(2) of the Evidence Act-vide in re Daddapaneni Narayanappa MANU/TN/0703/1910 : 1910 Indian Cases page-286 (Madras). It was held in Karupaanna Konar v. Rangaswami Konar MANU/TN/0400/1927 : AIR 1928-Madras-105(2) at page-106 that, a mere statement of boundary cannot be classed with any of the verbs in Section 13 of the Evidence Act of created, modified, recognised, asserted or denied and is therefore not admissible; the same is not even admissible under Section 32(3) of the Evidence Act as it is a statement and not the document containing the statement that must be against the proprietary interest of the person making it. It was held further that the lower court influenced by the idea of the document is an ancient one and the recitals obviously not intentionally false and are therefore presumably true; having overlooked the fact that parties making statements which are not material to their interests have no occasion to be accurate. In Ramacharandas v. Girijachanddevi MANU/SC/0358/1965 : AIR 1966-SC 323 it was held that the recitals in a document would operate as an estoppel against the author of the document. The only restriction in this regard is that, an estoppel is confined to the transaction covered by the document and the recital cannot be treated as an estoppel in a collateral transaction. Even this principle has several ramifications- For Example: if the deed is fairly old, the recitals cannot be altogether discarded and such recitals gain sufficient weight with the passage of time even as regards collateral transactions. This however depends upon the facts and circumstances of each case. An important area of interpretation of documents is the realm of the nature of the document. Ascertainment of nature of document

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including from the contents and attending circumstances, intention of the executant (unilateral) and parties to it (bilateral) assumes importance as law prescribes different patterns and procedures for different types of transactions covered by the documents and its execution and proof. It was laid down in Rangayyan v. Inasimutthu AIR 1956-Madras-226 that, recitals of the boundaries in a document inter-parties is admissible as a joint statement of the parties executed it to act as admission, where as recitals of a document between a party and stranger is relevant against the party as an admission but is not admissible in his favour unless the fact recited is deposed by executants of the document in Court to act as a corroborative evidence under Section 157 of the Evidence Act or to contradict under Sections145 & 155(3) of the Evidence Act; whereas recitals as to boundaries in the document between third parties, it is not ordinarily admissible to prove possession or title as against a person, who is not party to the document, but for at best to corroborate or to contract. The probative value to be attached to such recitals in the documents even admitted in evidence is depending upon the facts and circumstances of each case right from "0" to clinching evidence as the case may be from material on record of the respective cases- See also Umarapartvathy Vs.Bhagvathy Amma MANU/TN/0317/1972 : AIR 1972 Madras-151.

15(a)(vi). Documents executed ante-(pre-liti), pendenti and post-litem motam: In Harihar Prasad Singh v. Deonarayan Prasad AIR 1956-SC-305 - it was held in para-5 that recitals in the documents executed ante(pre-liti) litem motam and inter parties held of considerable importance and their probative value as against them is high from the recital of private lands of the proprietor (which includes de facto/dejure) in assertion of their title and for its admissibility under Section 13 of the Indian Evidence Act. It was however, observed that the respondents are right in contending that the recitals cannot be considered as admissions by the mortgagees as they were executed by the mortgagors. It is also held in Rangayyan v. Inasimutthu (supra) that depending upon the recitals in the documents executed ante-pre, pendenti and post-litem motam and from nature of recitals and other circumstances of between inter parties or third parties;

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the probative value to be attached to such recitals in the documents even admitted in evidence is depending upon the facts and circumstances of each case right from "0" to clinching evidence as the case may be from material on record of the respective cases. In Dolgobinda Paricha v. Nimai Charan Misra MANU/SC/0188/1959 : AIR 1959-SC-914 - it was held that-it is also well settled that statements or declarations before persons of competent knowledge made ante litem motam are receivable to prove ancient rights of a public or general nature. The admissibility of such declarations is, however, considerably weakened if it pertains not to public rights but to purely private rights. It is equally well settled that declarations or statements made post litem motam would not be admissible because in cases or proceedings taken or declarations made ante litem motam, the element of bias and concoction is eliminated. Before, however, the statements of the nature mentioned above can be admissible as being ante litem motam they must not only be before the actual existence of any controversy.

15(a)(vii). Presumption of thirty years old document: In Harihar Prasad Singh(supra)-it was also held by placing reliance upon the expression in Basanth Singh v. Brijraj Sadan Singh MANU/PR/0038/1935 : AIR 1935 PC 132 (c)- regarding presumption of thirty years old document under Section 90 of the Indian Evidence Act that, a presumption can be raised only with reference to original document and not to copies thereof. If the document happens to be signed by the agent of the person against whom the presumption is sought to be raised and there is no proof that he was an agent, Section 90 does not authorize the raising of a presumption as to the existence of authority on the part of the agent to represent that person. In Union of India v. Ibrahim Uddin MANU/SC/0561/2012 : 2012(6)SCJ-432=Civil Appeal No. 1374/2008, dt.17-07-2012- it was held regarding presumption of thirty years old document under Section 90 of the Indian Evidence Act, that the presumption is in respect of genuineness of a document as regards signature, execution and attestation, but not as regards the correctness of the contents of the document. In T. Ramesh v. Lakshmamma MANU/AP/0239/1999 : 1999 (2)-ALT-553, it was held referring to H. Venkatachala v. B.M.

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Thimmajamma MANU/SC/0115/1958 : AIR 1959 -SC-443 and Dhanapala v. Govindaraju MANU/TN/0212/1961 : AIR 1961-Madras-262 and extracts from Tailor's Law of Evidence & Halsbury's Law of England that, law recognizes a conclusive presumption in favour of due execution of insured deeds and Wills when those instruments are 30 years old and are unblemished by any alterations and are produced from natural custody, they are said to be proved themselves. A bare production is sufficient and the scribe and witnesses being presumed to be dead and in the absence of circumstances of suspicion to have been duly sealed, attested, delivered or published according to their purport, when those are above 30 years produced from proper custody in saying that those are by production said to be proved themselves. The proper custody is in the custody of a person, who might be reasonably and naturally be expected to have possession of them. It would be dangerous no doubt for the courts to draw presumption of due execution mechanically on the face of the documents purporting to be 30 years old; and coming from proper custody in as much as the presumption dispense with proof of due execution, thereby the Court must act with extreme caution and utmost circumspection from the language used "May presume" in Section 90 of the Evidence Act conferring judicial discretion to be exercised by the Court in drawing the presumption. It is within the judicial discretion of the Court having regard to facts and circumstances of each case. See also Ch. Adiseshamma v. Rama Rao MANU/AP/0078/1973 : AIR 1973 AP 149

15(a)(viii). Attestation of a document is when to attribute knowledge of its contents: In Pandrang Krishnaji v. N. Tukaram MANU/PR/0132/1921 : AIR 1922 PC 20- it was held on how far mere attestation of a document is to attribute knowledge of its contents and whether to say he attested with knowledge and consented to the transfer, that the attestation of a deed by itself estops a man from denying nothing whatsoever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the document and it ought not to be put to word alone for the purpose of establishing that a man consented to the transaction which the document effects. Mere attestation does not affect as an estoppel,

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for attestation does not fix the attesting witness with knowledge of contents of the document or implying consent for the contents of the document, unless it is established by the independent evidence that to the signature was attached the express condition that it was intended to convey something more than mere witnessing to the execution and was meant as involving consent to the transaction - vide Rajyammmal v. Sabhapathi MANU/PR/0023/1944 : AIR 1945 PC 82 & Pandrang (supra).

15(a)(ix). Attestation of a document and mode of proof: Section 3 of the Transfer of Property Act, defines attestation in relation to an instrument (to mean non-testamentary-though same analogy applies to testamentary with reference to Section 63 of the Indian Succession Act), means and shall be deemed always to have meant, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executants a person acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary. As per the Apex Court's expression in Abdul Jabbar v. Venkata Shastry MANU/SC/0019/1969 : AIR 1969 SC 1147 - to attest is to bear witness to a fact. The essential conditions of a valid attestation are that two or more witnesses have seen the executant sign or affix his mark to the instrument, or have seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executants a person acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executants to bear the witness to this fact, it is essential that the attesting witness has put his signature animus attestandi that is for the purpose of attesting the signature of the executant. See the discussion supra of mere attestation is not suffice to attribute knowledge of contents.

15(a)(x). As per Section 68 among Sections 68 to 71 of the Indian Evidence Act, regarding of the proof of an attested

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instrument(other than Will), it is unnecessary to call any attesting witness in the case of compulsory attestable deed, unless execution of the deed is specifically denied by the person by whom it purports to have been executed. If the execution is specifically denied one attesting witness must be called upon to prove the deed-if there be one alive and subject to the process of the Court. If the attesting witnesses are dead their signature can be proved by other evidence of person acquainted with or opinion from comparison with signature/handwriting/thumb impression as the case may be(under Sections 47 & 67 and or Sections 45 r/w.51 and or Section 73 of the Evidence Act).

15(a)(xi). A composite document which is severable and in part clearly testamentary, such part may take effect as a Will and other part if it has the characteristics of a settlement and that part will take effect in that way. A document which operates to dispose of properly in praesenti in respect of few items of the properties is a settlement and in future in respect of few other items after the deeds of the executants, it is a testamentary disposition. That one part of the document has effect during the life time of the executant i.e. the gift and the other part disposing the property after the death of the executant is a Will and in such case stamp and registration are compulsory-vide Rev. Fr. M.S. Poulose v. Varghese and others MANU/SC/1015/1995 : (1995) Supp 2 SCC 294.

15(b)(i). In the interpretation of Wills in India, regard must be had mainly to the rules of law and construction contained in Part VI of the Indian Succession Act and particularly Section 88 of the Indian Succession Act and not the rules of the Interpretation of Statutes-vide - Mathai Samuel v. Eapen Eapen (dead) by Lrs MANU/SC/0996/2012 : 2013(1 ALT(1)(SC).

15(b)(ii). In Narendra Gopal v. Rajat Vidhyardhi MANU/SC/8433/2008 : (2009) 3 SCC 287 at para-32(cl.3) it was held that, in appreciating the documents of unilateral dispositions and testamentary dispositions like Wills, the true intention of the testator (executant) has to be gathered, not by attaching importance to isolated expressions but by reading the document as a whole.

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15(b)(iii). The nomenclature given by the parties to the transaction in question is not decisive, but the contents and the intention of the executant, which must be found in the words used in the document. The question is not what may be supposed to have been intended, but what has been said. One need to carry on the exercise of construction or interpretation of the document only if the document is ambiguous, or its meaning is uncertain. The real and the only reliable test for the purpose of finding out whether the document constitutes a Will or a gift/settlement is to find out as to what exactly is the disposition which the document has made, whether it has transferred any interest in praesenti in favour of the beneficiaries or it intended to transfer interest in favour of the beneficiaries only on the death of the executant.

15(b)(iv). "Will" as defined in Section.2(h) of the Indian Succession Act- means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death". 'Will' is derived from the Latin word "Voluntas" to mean expression of intention of a testator generally in a document. 'Testament' is derived from the Latin word "Testatio-mentis" to mean testifies the determination of the mind. Thus, it is a legal declaration of a person's intention to take effect after death of that person. According to Schoulder's - law of Wills, a Will is the aggregate of man's testamentary intention so far as the same is manifested in writing and duly executed according to the Statutes.

15(b)(v). Lord Wilmot, C.J. in Doe Long v. Laming (2 Burr. at pp.11-12) described the intention of the testator as the "pole star" and is also described as the "nectar-of the instrument".

15(b)(vi). Underhill & Strahan on interpretation of Wills and Settlements-(1900 Edn.), while construing a Will stated that "the intention to be sought is the intention which is expressed in the instrument not the intention which the maker of the instrument may have had in his mind. It is unquestionable that the object of all expositions of written Instruments must be to ascertain the expressed meaning or intention of the writer; the expressed meaning being equivalent to the intention....."

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15(b)(vii). In Halsbury's Laws of England, 4th Edn., Vol.50, P.239, it is stated: "408.The only principle of construction which is applicable without qualification to all Wills and overrides every other rule construction, is that the testator's intention is collected from a connection with any evidence properly admissible and tile meaning of the Will and of every text of it is determined according to that intention."

15(b)(viii). 'Will' therefore has the four essentialities- (i) It must be a legal declaration of testator's intention, (ii) That declaration must be with respect to his property, (iii) The desire of the testator that the declaration should be effected after death of testator and (iv) The other Essential quality of testamentary disposition is ambulatoriness of revocability during executants' lifetime. Such a document is dependent upon executants' death for its vigour and effect. A Will need not be stamped under the Indian stamp Act and need not be necessarily registered being optional under Section 18 of the Indian Registration Act. It is different to Gift or Settlement or other disposition by transfer of rights in immovable property worth above Rs. 100/- which necessarily be registered under Section 17 of the Indian Registration Act, besides duly stamped, though when stamped or impounded and even unregistered can be admitted for collateral purpose under Section 49 of the Indian Registration Act. So far as Will concerned when it its required to be proved as contemplated by Sections 68-71 Indian Evidence Act and Section 63 Indian Succession Act, till then it cannot be used even for collateral purpose (for the reasons stated with reference to the existing law of the land in the earlier paras). In Paranru Radhakrishnan v. Bharathan MANU/KE/0030/1990 : AIR 1990 Kerala 146 it was held that the imperative and clear straight wording of Section 68 Evidence Act makes it clear that it does not permit the use of a document which is required by law to be attested as evidence until it is proved strictly in accordance with the provisions of the Section.

15(b)(ix). Though registration is optional and not compulsory and non registration is by itself not a ground to doubt, registration is one of the positive circumstances to infer in favour of due execution, unless evidence on record shows otherwise.

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Registration of Will being optional, mere registration does not dispense with the proof of execution and attestation, but for to serve only a piece of evidence of the execution. That It is also of the reason that Will operates after the death of the testator and in his life time he can alter or cancel the bequeaths by codicil or fresh Will any number of times as facts and circumstances shown permitted and thereby also the last disposition prevails over the earlier even in same document for same property in case of inconsistent bequeaths. In Shivdev Kour v. R.S. Grewal MANU/SC/0260/2013 : 2013(3)ALT-1(SC) para-12 & in Balwant Kour v. Chanan Singh MANU/SC/0282/2000 : AIR-2000-SC-1908 it was held that all the clauses of the Will must be read together to find out the intention of the testator. This is obviously on the principle that the last clause represents the latest intention of the testator(See also Section 88 of the Indian Succession Act).

15(b)(x). Will as can be said speaks from the grave of the testator as executant of the Will cannot be called upon to admit or deny execution, much less to explain any circumstances surrounding the execution and testamentary capacity and condition with reference to sound and disposing state of mind and thus for appreciating the evidence of due execution and genuineness of bequeaths, the court Will put itself in to the armchair of the executant/testator. The intention of the testator in this regard must be ascertained not only from the words used, but also from surrounding circumstances with reference to the unimpeachable evidence regarding genuineness and authenticity as well as probabilities and improbabilities and unnatural or unfair bequeaths with reference to the direct or indirect beneficiaries of the bequeaths in the Will/testament known as pronouncer/s influence and role as to not a free Will and volition of the testator in making the bequeaths and reasons or circumstances in relation to natural heirs and their relation with the testator for ignoring and making bequeaths to other than natural heirs or preferring among the natural heirs or preferring other than natural heirs also as the legates. If in relation to the above or otherwise, there are any suspicious circumstances or cloud shrouded around the execution and in the bequeaths, the propounder has to discharge of the burden lies on him to prove

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and dispel the suspicious circumstances to clear the cloud and probablises the genuineness of execution and the bequeaths as per free will and volition of testator as mere ignoring the natural heirs or preferring among them or preferring other than natural heirs also by itself not a ground to doubt genuineness for the reason that the testamentary dispositions by Will itself is to interfere or alter or divert the natural line and of flow from the intestate succession and survivorship by reducing or depriving the share of natural heirs if any at the discretion and Will of the testator. Apart from it, it is it is absolutely necessary of execution of the Will under Section 63 of the Indian Succession Act to prove that the Will was attested by the two attesting witnesses at least who saw the testator sign the Will or the testator must personally acknowledge the signature on the Will that of him in the presence of the two attesting witnesses and they themselves signed the same in the presence of the testator. Without attestation, execution of the deed of Will is not valid. When no witness deposed of the alleged Will was signed by the deceased in his presence or that he had attested the document, execution of the very Will can be held as not proved. A reading of even Section 68 of the Evidence Act shows that attestation and execution are the two different acts one following the other. Where the Will is registered and there are signatures of registering officer and of identifying witnesses affixed to registration endorsement, endorsement by sub-registrar that executant has acknowledged execution before him amounts to attestation and when all they deposed the same of due execution and attestation, it is a compliance of Section 63 Indian Succession Act. It is for the Court to appreciate from the above, including intention of the testator with reference to contents, other attending facts and surrounding circumstances like considerations in making bequeaths instead of allowing the estate by intestacy to claim legal heirs equally, motive of the testator in the recitals even by making dispositions to the natural heirs who otherwise even succeed, propounder influence if any, needless to say propounder of the Will has to dispel with the suspicious circumstances shrouded around the Will and its execution and manner of dispositions, the position of the testator, his family relationship and preference of some among the family members or preference of some other than the family members and among the legal heirs

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remote to the nearest and other considerations in making bequeaths, propounder influence-(irrespective of not direct beneficiary). There are no set parameters to judge all these aspects but for within these broad guidelines to appreciate the evidence on record of the case on hand within the ordinary and reasonable prudence to arrive at a just conclusion, for each case depends on its own facts- vide decisions in Raghunath Prasad Singh v. Deputy Commissioner MANU/PR/0150/1929 : AIR 1929 PC 283, Mokshada Ranjan v. Surendra Bijos MANU/WB/0174/1938 : AIR 1939 Calcutta-40, Dasarath Gayan v. Satyanarayana Ghosh MANU/WB/0058/1963 : AIR 1963 Calcutta-325, Lalta Baksh v. Phool Chand MANU/PR/0012/1945 : AIR 1945 PC 113, Kapuari Kuer v. Shamnarain Prasad MANU/BH/0034/1962 : AIR 1962 Patna-149, Savitri Ammal v. State AIR 1960 Madras 217, Dr. M. Ratna v. K. Navaneetam MANU/AP/0026/1994 : AIR 1994 AP 96, Ram Gopal v. Nandlal MANU/SC/0044/1950 : AIR 1951 SC 139, Gnanambal Ammal v. T.Raju Iyyer MANU/SC/0045/1950 : AIR 1951 SC 103, Raj Bhajrang Bahadur Singh v. Thakurian Bhaktaraj Kuer MANU/SC/0081/1952 : AIR 1953 SC 7, Girja Dutt v. Gangotri Dutt MANU/SC/0092/1955 : AIR 1955 SC 346, H. Venkatachala Iyangar v. B.N. Timma rajamma MANU/SC/0115/1958 : AIR 1959 SC 443, Kameswara Rao v. B. Surya Prakasa Rao MANU/AP/0088/1962 : AIR 1962 AP 178, Rani Purnima Devi v. Kumar Khagrendra Narayan Deb MANU/SC/0020/1961 : AIR 1962 SC 567, Peareylal v. Rameswar Das MANU/SC/0398/1962 : AIR 1963 SC 1703, The Constitutional Bench expression in Shashi Kumar Benarji v. Shubodh Kumar Benarji MANU/SC/0278/1963 : AIR 1964 SC 529, T.V. Kaur MANU/SC/0248/1963 : AIR 1964 SC 1323, Surendra Pal v. Dr (Smt) Saraswathi Arora MANU/SC/0289/1974 : AIR 1974 SC 1999, Beni Chand v. Kamala Kunwar MANU/SC/0297/1976 : AIR 1977 SC 63, Jaswant Kaur v. Amrit Kaur MANU/SC/0530/1976 : AIR 1977 SC 74, Brijmohanlal Arora v. Giridharlal Manocha MANU/SC/0249/1978 : AIR 1978 SC 1202, Smt. Indu Balabore v. Manindra Chandra Bose MANU/SC/0386/1981 : AIR 1982 SC 133, Kalyan Singh v. Choti MANU/SC/0258/1989 : AIR 1990 SC 396, Ram Pyari v. Bhagwanh MANU/SC/0306/1990 : AIR 1990 SC 1742, Veerattalingam MANU/SC/0388/1990 : AIR 1990 SC 2201,

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Kasibhai v. Parwatibai MANU/SC/0799/1995 : 1995 (6) SCC 213, Rabindranath Mukherjee v. Panchanan Benarji MANU/SC/0322/1995 : AIR 1995 SC 1684, PPK Gopalan Nambiar MANU/SC/0354/1995 : AIR 1995 SC 1852, Daulat Ram v. Sodha MANU/SC/0969/2004 : AIR 2005 SC 233, S.Sundaresara pai v. Sumangala T.Pai MANU/SC/0750/2001 : AIR 2002 SC 317, Janki Narayan Bhoir v. Narayan Namdeo Kadam MANU/SC/1155/2002 : AIR 2003 SC 761 :(1)Supreme-297, Umadevi Nambiar v. T C Sridhan MANU/SC/1026/2003 : 2004(2)SCC 321, Daulat Ram v. Sodha MANU/SC/0969/2004 : AIR 2005 SC 233, Sridevi v. Jayaraja Shetty MANU/SC/0065/2005 : AIR 2005 SC 780, Pentakota Satyanarayana v. Pentakota Seetharatnam MANU/SC/0819/2005 : AIR 2005 SC 4362, Gurdev Kaur v. Kaki MANU/SC/2699/2006 : AIR 2006 SC 1975, Gopal Swaroop v. Krishna Murthy MANU/SC/0988/2010 : AIR 2010(14)SCC 266, Mathai Samuel(supra).

15(b)(xi). Coming to the proof of WILL (testamentary instrument execution which includes attestation and its proof). Apart from the other expressions supra, the Constitutional Bench expression in Shashi Kumar Benarji(supra) held at page-531, para-3 that the mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act,1925, which says the testator shall sign or affix his or her mark to the Will or it shall be signed by some other person in the presence and by his direction and the Will shall be attested by two or more witnesses each of whom has seen the testator signing or affixing his or her mark to the Will or as seen some other person signed the Will in the presence and by the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator and Section 68 of the Indian Evidence Act mandates in the case of denial or not of execution, examination of one attesting witness atleast in proof of the Will whether registered or not. In the absence of suspicious circumstances, it is suffice to prove testamentary capacity and due execution with attestation and where there are suspicious circumstances, the onus is heavy on the propounder to dispel the same for the court acceptance as genuine and last Will

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and testament. Attestation of a Will means testifying the signature of the executant. It is equally important that for a Will to be valid and enforceable shall be attested by two or more witnesses, each of whom has seen testator sign or affix his mark to the Will or the testator should personally acknowledge his signature or affixture of his mark to the Will in the presence of the attestors and without that acknowledgement, it cannot be inferred and further each of the witnesses has signed said Will in presence of testator and said provision is not a mere formality, but mandatory. Proof of attestation of the Will is also mandatory - Dr. M.Ratna v. Kottaboina Navaneetham MANU/AP/0026/1994 : AIR 1994 AP 96, Yumnam O.T.I. Devi (supra) & A. Poline D'Souza v. John D'Souza MANU/SC/7718/2007 : 2007(7)SCC 225. However, Court cannot disregard evidence of attending circumstances on record if those must satisfy itself as to compliance on the totality, like giving evidence by one attesting witness and there is no dispute about presence of other attesting witness at the time of execution of the Will from the other contesting party from the other attestor's name finds place in the Will even the witness examined did not speak by mere non-recollection of said fact from lapse of time to the date of evidence from date of document and its execution vide decision M.B. Ramesh v. K.M. Veerajeurs MANU/SC/0462/2013 : 2013(7) SCC 490. Such circumstances are in fact rare and as such, the attesting witness examined otherwise must also speak the presence and attestation of other witness also as part of proof. Thus, in view of Section 63(1)(c) of the Indian Succession Act r/w Sections 68 & 71 of the Indian Evidence Act, it is sufficient even one attestor is examined, but that attestor should speak not only about the testator's signature or affixing his mark to the Will or somebody else signing it in his presence and by his direction or that he had attested the Will after taking acknowledgement from the testator of the signature or mark, but he must also should speak that each of the witnesses had signed the Will in the presence of the testator. It is irrespective of non-denial of its execution, one attesting witness at least as a concession out of minimum two persons to attest as required, must be called upon to prove the deed, if there be even one alive and subject to the process of the Court. But what is significant is that said attesting witness examined must be able to speak to the

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attestation by the other attestor also. Section 71 Evidence Act has no application if the attesting witness only one examined (of the two or more attestors) has failed to prove the execution of the Will and the other attesting witness/s even available not summoned and examined. It is clear from the language of Section 71 Evidence Act, that if an attesting witness examined denies or does not recollect execution of the document, its execution, may be proved by other evidence(under Sections 47 & 67 and or Sections 45 r/w.51 and or Section73 of the Evidence Act). Sections 71 when cannot be resorted to from said one attesting witness fails to prove the will and the other attesting witness if alive and available without his examination to prove by other evidence, it cannot be said the execution is proved as per law as Section 71 of the Evidence Act is only a permissive provision and enabling section to permit a party to lead other evidence only in certain circumstances-which are the above as it is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and such impossibility cannot be let down without any other means of proving due execution by other evidence as well. Section 68 of the Evidence Act is not merely an enabling section as it lays down the necessary requirements, which the Court has to observe before holding that a document is proved. Thus, Section 71 of the Evidence Act cannot be read so as to absolve a party of his obligation under Section 68 of the Evidence Act read with Section 63 of the Indian Succession Act - to liberally allow him, at his choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the Court concerned and confer a premium upon his omission or lapse, to enable him to give a go-bye to the mandate of law relating to the proof of execution of a Will. Where the attesting witness called upon to prove execution, is not in a position to prove the attestation of the Will by second witness, the evidence of the witness falls short of the mandatory requirements of Section 68 of the Evidence Act read with Section 63 of the Indian Succession Act and Section 71 of the Evidence Act can only be invoked in such case and proved no other attesting witness available including by attempt to summon for securing- See - Janaki Narayan Bhogir(supra), Karri Nukaraju v. Putra Venkatrao MANU/AP/0060/1974 : AIR 1974 AP 13 & Babu Singh v. Ram

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Shahiaram singh MANU/SC/2456/2008 : 2008(14) SCC 754. Further, Section 69 of the Evidence Act, applies in the absence of attesting witness and only when party moves the Court for summons under Order 16 Rule 10 CPC and the witness fails to obey the summons to prove the Will in the manner prescribed by Section 68 of the Evidence Act - vide Babu Singh(supra). If the attesting witnesses are dead their signature can be proved by other evidence of person acquainted with or opinion from comparison with signature/handwriting/thumb impression as the case may be (under Section 47 & 67 and or Section 45 r/w.51 and or Section 73 of the Indian Evidence Act. No doubt, it was held by the division bench of our high Court in Alluri JS Lakshmi v. Kopparthi R Rao MANU/AP/0051/1994 : 1994(1)ALT 217(DB) that execution of Will need not be proved when it is admitted by other side and when contest is only on legal aspects as to validity of bequeathing certain properties covered by the will. For that conclusion mainly relied upon Section 58 of the Evidence Act. In fact, without attestation when execution is not complete and without proof of execution by attestation, the disputed contents of it cannot be looked into as also laid down by the Apex Court in catena of expressions supra. Besides that, in the case on hand there is no admission of execution and attestation and also contents since all are denied and disputed. It is laid down even by the later expression of the Apex Court that without attestation, execution of the Will is not valid-vide decision Kahibai v. Parwatibai MANU/SC/0799/1995 : 1995(6)SCC 213. Where genuineness of the Will is questioned, it is the duty to prove the Will is the product of free mind of the testator and it is the duty of the propounder to dispel the surrounding suspicious circumstances, if any - vide decisions in Savithri v. Karthyayani Amma MANU/SC/8061/2007 : (2007) 11 SCC 621; Gopala Krishna Pillai v. Meenakshi Ayel MANU/SC/0268/1966 : AIR 1967 SC 155, Venkatachala Iyangar and other decisions referred in the previous paras(supra).

15(c). Coming to controversy as to in the absence of proof of due execution and attestation, some of the contents of the document if not in dispute whether can be looked for collateral purpose; the law in this regard culled out to settle the controversy is the following:

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15(c)(i). Regarding the written authority by husband to wife to adopt a child by her after his life time under uncodified Hindu law, it was observed in Para 453 of Mulla of page 780 that the authority must be in writing and registered, unless it is given under a Will vide decision Mottasiddilal V. Kundanlal 1906 (28) All. 377 and Ravath V. Beni Bahadur AIR 1926 PC 1927 and if the authority is given under a Will, it must be executed in accordance with the formalities required by Section 63 of the Indian Succession Act. It is to say collateral purpose is not recognised or considered in the above.

15(c)(ii). In Shib Chandra v. Gour Chandra Paul MANU/WB/0453/1922 : AIR 1922 Calcutta 160 - it was at Page 162, referring to Section 68 of the Indian Evidence Act, on admissibility for a collateral purpose or not of a compulsory attestable document even denied execution and attestation, not proved under Section 68 of the Evidence Act, it was held that Section 68 of the Evidence Act applies not only to cases where document is admitted to be enforced to prove the legal right or relation it creates, but in case where such document is sought to be proved for a collateral purpose. The view is also supported by the impetrative wording of Section 68, which does not permit the admissibility of the instrument as evidence for any purpose, what so ever unless and until, it is proved in strict compliance with the provisions of the Section. The rigor of the English Law, on which the present Section is founded, has been to a certain extent lessened by the proviso as contained in Section 70 of the Evidence Act. The enactment of this proviso clearly indicates that the Indian legislature intended to provide only one exception to this inflexible rule and no other. Later also in Awadhu Ram v. Mahbub Khan AIR 1924 Oudh 255, the division bench of the Oudh High Court held at page 259 referring to Section 68 of the Evidence Act that, there is no distinction between documents which are the basis of a suit and those whose production is required for a collateral purpose, so far as their admissibility in evidence is in question. The direction in Section 68 of the Evidence Act is mandatory and draws no such distinction. In Pt. Shyam Lal v. Lakshmi Narain and others MANU/UP/0105/1938 : AIR 1939 All 269 (DB), it was held by the Allahabad High Court that Section 68 of the Evidence Act does not

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apply to a document, which is merely to be proved for admission of contentions in it. Further in Mahadio Prasad v. Gulam Mohd. MANU/UP/0356/1946 : AIR 1947 Alahabad 161 (DB) referring to Section 68 of the Evidence Act, it was held by the division bench of the Allahabad High Court that Section 68, applies only if document is relied upon as requiring attestation-for example a Will. Non-compliance with the provisions of Section 68 of the Evidence Act, however, does not prevent the document from being used in evidence under Section 72 for any other or collateral purpose and to that conclusion they placed reliance upon the earlier expressions of the Allahabad High Court of 1915, 1918 and Pt. Shyam Lal(supra) of 1939, in saying use of the document for collateral purpose is not a bar, from the bar under Section 68 of the Evidence Act; as Section 68 applies only if a document is relied upon as one requiring attestation to comply. However, in the later judgment reported in Paranru Radhakrishnan v. Bharathan MANU/KE/0030/1990 : AIR 1990 Kerala 146, by referring Section 68 and 69 of the Evidence Act and also referring to the above expressions of the Calcutta, Ough and Allahabad High Courts, the Kerala High Court held that from reading of Section 68 of the Evidence Act, it is evident that a document which is required by law to be attested, shall not be used at all as evidence, until one of the attesting witnesses at least has been examined to prove its execution. The imperative wording of Section 68 of the Evidence Act makes it clear that it does not permit the utilisation of a document, which is required by law to be attested as evidence until it is proved strictly in accordance with the provisions of the Section. From a reading of Section 68 of the Evidence Act and its proviso, it is not possible to hold that the rigor of the section can be watered down in case of a Will, which is required by law be attested to prove it to use the same in evidence even for collateral purposes. Thus, where the production of Will was for the purpose of establishing right in the property and not relationship between the parties and the testator, strict compliance of Section 68 of the Evidence Act is mandatory and without adhering to the provisions, it cannot be used even for any collateral purpose.

15(c)(iii). It is in this background, it is important to refer the recommendations of the Law Commission of India, suggesting an

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amendment to be made to the Indian Evidence Act for various sections covered by 185th report and though at pages 185.179 to 185.183, it was dealt with the above propositions also in suggesting amendment for admissibility to the collateral purpose, without need of proving the due execution and attestation for admissibility to the main purpose. It speaks from the 69th report, among the amendments suggested include amendments to Section 68 of the Evidence Act and under Sections 57, 58 and 63 of the Indian Succession Act and Sections 59 and 123 of the Transfer of Properties Act. The Law Commission 69th report recommendations also stated the opinion of Sarkar, the Author on the Evidence Act that Section 68 of the Evidence Act should not apply, if the Will is more than 30 years old under Section 90 of the Evidence Act or was not produced in spite of notice to produce under the Evidence Act; which proposals are broadly in conformity with the English Law as it stands after the UK Evidence Act, 1938.....which accept even in case of Wills for other situations where witness is kept out of way..... Sarkar on Evidence (15th edition-1999) at page 1124, Wigmour on Evidence at Para 1288, speak that the theory that parties must be deemed to have agreed that the attestor will be a person, who should speak about the circumstances of the execution, is not correct and there is no such agreement can be implied, particularly, when attestation is required by law. As per Sarkar, Page 1124 the attestor is in practice, not usually a person who knows anything about the circumstances preceding the document execution and also on the aspect, the words shall not be 'used in evidence' mean that the document can be used for collateral purposes. Several Jurists in America relaxed the rule for the purpose of collateral or incidental use (Wigmore Section 129 quoted by Sarkar Page 1129) as relaxed the rule in admission of a mortgage bond in MANU/UP/0399/1915 : AIR 1939 Allahabad 366, AIR 1915 Allahabad 254. The Law Commission thus proposed that the inadmissibility must be confined to the testamentary disposition and not for collateral purpose and recommended that Section 68 of the Evidence Act must be confined only to Wills and required to be re-drafted and the exceptions added and referred to in the 69th report required. It clearly speaks even from the Law Commission 69th Report, so far as a Will is concerned the admissibility cannot

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be without examining at least one of the attestors in proof of due execution even to read any of the contents that what practically laid down by the Kerala High Court referring to the earlier expressions of Allahabad, Haryana and Calcutta High Courts. The Apex Court in Kashibai and another v. Parwatibai MANU/SC/0799/1995 : 1995 (6) SCC 213 held at paras 10 and 11 that Section 68 of the Indian Evidence Act shows that the attestation and execution are the two different acts one following the other. There can be no valid execution of a document which is required by law to be attested without the proof of its due attestation and if due attestation is also not proved; the fact of execution of the Will is of no avail-See also several expressions referred and discussed in the previous paras supra and in particular of the Karri Nukaraju, Dr. M. Ratna & Janki Narayan Bhoir- with reference to Section 3 of the Transfer of Property Act, Sections 68-71 of the Indian Evidence Act & Section 63 of the Succession Act, with regard to the execution of unprivileged Wills the word attested has been defined as in Section 3 of the Transfer of Property Act. In the case on hand, as found by the trial Court, none of the witness to the Will had deposed that the deceased-attestor had signed the Will before them and that they had attested it and in the absence of such evidence, it is difficult to accept that the execution of the Will was proved in accordance with law, but held that Will has not been proved. In Babu Singh(supra) held referring to Section 68 of the Evidence Act, Section 63 of the Indian Succession Act and Section 3 of the Transfer of Property Act that to prove due execution of Will, at least one attesting witness required to be examined as attestor must be in conformity with Section 3 of the Transfer of Property Act and with the requirement of Section 63 of the Indian Succession Act, that must be complied with.

15(d). Coming to decide an entry or entries in an account book whether can be admitted to read with relevancy within the meaning of Sections 11 or 32 or 13 or 34 of the Evidence Act concerned, (it is in addition to the meaning and scope of Sections 11 or 32 or 13 or 34 of the Evidence Act referred supra, though in a different context on contents of a will can be read for collateral

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purpose, even not proved as contemplated by law); the legal position on the subject is the following:

"15(d)(i). The Division Bench of Madras High Court in AIRLSVLS Chettiyar v. RSMVR Dorai Singa MANU/TN/0390/1938 : AIR 1940 Madras 273 it was held at page 278 that, statement not satisfying the considerations laid down in Section 32 of the Evidence Act cannot be admitted, even under Section 11 of the Evidence Act, merely because it may be probablises relevant fact; as Section 11 must be read subject to the other provisions of the Act. It is in saying what is not admissible under Section 32 cannot be admitted under Section 11 of the Evidence Act and Section 11 of the Evidence Act no way helps independently to admit what is not admissible under Section 32 of the Evidence Act.

15(d)(ii). In re Daddapaneni Narayanappa MANU/TN/0703/1910 : 1910 Indian Cases page-286 (Madras), it was held that recital in a document of neighboring land, referring one of its boundary as suit land and it belongs to a particular person, for the person to rely on it, is not legal evidence and the same is not even admissible under Section 32(2) of the Evidence Act. The decision while saying neighboring owners document referring boundary recital of suit land not legal evidence to the lis, held therefrom as not even admissible under Section 32(2) of the Evidence Act. It no way says the recital won't come under Section 32(2) of the Evidence Act.

15(d)(iii). It was also held in Karupaanna Konar v. Rangaswami Konar MANU/TN/0400/1927 : AIR 1928-Madras-105(2) at page-106 that, a mere statement of boundary cannot be classed with any of the verbs in Section 13 of the Evidence Act of created, modified, recognised, asserted or denied and is therefore not admissible; the same is not even admissible under Section 32(3) of the Evidence Act as it is a statement and not the document containing the statement that must be against the proprietary interest of the person making it. It is to say, if it is the statement in a document it comes within the purview of Section 13 & 32(3) of the Evidence Act

15(d)(iv). The other decision in Siripalli Venkata Rayagopala Raju v. Hota Narsaiah Madras High Court Volume 26 Indian cases

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page 747 of the year 1914 D.B., it was held that a document mentioned as sale deed executed by widow of the family asserting the property belongs to their husband were admissible under Section 13(1) of the Evidence Act as transaction so also written statement filed by them in suits which they are parties and in which they had made recitals. Whereas a document in which there is a recital between third persons in describing the boundary of property sold, as the suit property as that of particular family is not admissible under Section 13 of the Evidence Act as a transaction or even under Section 32 of the Evidence Act as an admission against interest.

15(d)(v). In Karpanna Kumar (supra), it was held further in dealing with Section 32 and 13 of the Evidence Act that under Section 32(3), it is the statement and not the document containing the statement which must be against the proprietary person making of interest and under Section 13 of mere statement of boundary cannot be classed with any of the verbs in Section 13 created, modified, recognized, ascertained or denied as is therefore not admissible under Section 13 (a) of the Evidence Act.

15(d)(vi). In fact as laid down by the Madras High Court later to the above in the year, 1956 in Rangayyan v. Inasimutthu (supra), recitals of the boundaries in a document inter-parties is admissible as a joint statement of the parties executed it to act as admission, where as recitals of a document between a party and stranger is relevant against the party as an admission but is not admissible in his favour unless the fact recited is deposed by executants of the document in Court to act as a corroborative evidence under Section 157 of the Evidence Act or to contradict under Sections 145 & 155(3) of the Evidence Act; whereas recitals as to boundaries in the document between third parties, it is not ordinarily admissible to prove possession or title as against a person, who is not party to the document, but for at best to corroborate or to contract. The probative value to be attached to such recitals in the documents even admitted in evidence is depending upon the facts and circumstances of each case right from "0" to clinching evidence as the case may be from material on record of the respective cases.

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15(d)(vii). The other decision in Jayan v. Jayala Laxman MANU/AP/0055/2008 : 2008 (3) ALD 657 DS, which is a division bench expression of this Court of the year,2008 that placed reliance by both sides regarding the scope of Section 32(7) read with 13(1) of the Evidence Act, holding that a deed executed by deceased Karta of joint family, the recitals can only be as between parties as to continuous and those claim under them, but by itself is not sufficient evidence to establish that suit property is self acquired property of deceased and admissibility of such recital under Section 32(7) read with 13(a) of the Evidence Act does not affect. At Para 28 to 33 of the judgment, it was observed that the recitals in the document in question in admissible under Section 32(7) and 13(a) of the Evidence Act, executed by late Muni Subbaiah by itself is not sufficient evidence to establish that suit property is self acquired. Recitals in deeds can only be the evidence as between parties to the continuous and those who claim under them at any rate a recital can be assertion of fact contained by the recital. Some other evidence must be available to substantiate the same. It is true that where alienation is questioned allowing after transaction took place, a recital in the document which is constrained with the probable and the circumstances of the case assumes greater importance, since the original parties to the transaction those who can have given efforts at the relevant point of time being grown old was passed away. However, such recital by itself does not constitute sufficient evidence to establish the extents of a fact.

15(d)(viii). The controversy is in fact set at rest by the Apex Court in the year,2003 in its expression in RVEV Gounder v. A.V. and V.P. Temple (supra), holding that Section 34 of the Evidence Act declares as relevant, entries in books of account regularly kept in the course of business, whenever they refer to a matter into which the Court has to enquire. When such entries are shown to have been made in the hands of a maker who is dead, the applicability of Section 32(2) of the Evidence Act is attracted; and according to which statement made by the dead person in the ordinary course of business and in particular when it constrains of entry or memorandum made by him in books kept in the ordinary course of business is out way is by itself relevant. The

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maker of the entry is not obviously available to depose in corroboration of the entry. In a given case, depending on the facts and circumstances brought on record, the Court of facts may still refuse to act on the entry in the absence of some corroboration. Therefore, this expression in RVEV Gounder supra crystalised that the relevancy of book of accounts under Section 34 of the Act no way lost its value for admissibility and relevancy from non-examination of the maker of the entries for such person when died.

15(d)(ix). Here from the above, in so far as Ex. A2 entry in the Ex. A1 account book maintained by the late husband of PW1 that was deposed and proved through PW1 and with reference to the same cross examination was done is admissible under Sections 11 read with 32(2&3) and also under Sections 13 & 34 of the Evidence Act, then to decide probative value of the entry on how far proved and disproved with reference to the evidence of PW1 and DW1and how far to act upon it, with or without corroboration, relating to the joint purchase by payment of an amount of Rs. 500/- to Ch. Lakshmi Narasimha Rao (defendant) for the purchase of plaint schedule Item-1 house site of 1200 sq yards at Mamillagudem in Khammam town, leave about the recitals in the Ex. A.9 cannot be looked into in this regard for the will is not proved as contemplated by law from what is discussed supra."

15(e). Whether there is any approbate and reprobate or inconsistent pleas taken by plaintiffs regarding plaint schedule Item-1 house site concerned; it is also the well settled principle of law that to be kept in mind that, a plaintiff can at best take alternative pleas, but cannot proceed on inconsistent pleas and even any pleas taken inconsistent to one another, he got the doctrine of election of one of the pleas thereby the other inconsistent plea being taken waived, for not entitled to approbate and reprobate. However, so far as defendant concerned, he can take any number of pleas to non-suit the plaintiff any in that course one plea may be inconsistent to the other, however, where he makes a counter claim, he is at par with plaintiff so far as the counter claim concerned and as such he cannot be permitted to make out a case inconsistent to his plea-vide decisions Balder Singh B.Manohar Singh MANU/SC/3519/2006 : AIR 2006 SC 2832, G.S. Mahalakshmi v. Shah Ranchhoddas

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MANU/SC/0466/1969 : AIR 1970 SC 2025 & Firm Srinivas Ram v. Mahabir Prasad MANU/SC/0021/1951 : AIR 1951 SC 177. Thus, having claimed the item No. 1 of plaint schedule as only joint property of plaintiffs and defendant, cannot be claimed by plaintiffs as part of joint family property.

15(f). He, who accepts a benefit under a deed or Will or other instrument, must adopt the whole contents of the instrument, must confirm to all its provisions and renounce all rights that are inconsistent with it. Election is obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternate rights or claims in cases where there is a clear intention of the person from whom he derives the one, that he should not enjoy both. Every case of election therefore, presupposes plurality of rights, with an intention of the party who has a right to control one or both, that one is substitute for others. The party who is to take has a choice, but he cannot enjoy the benefit of both as laid down in Streatfield v. Streat field and explained by the three judge Bench in Nagubai Ammal v. B. Shyam Rao MANU/SC/0089/1956 : AIR 1956 SC 593,para 23 page 602 that the doctrine of election is not however confined to instruments. A person cannot say at a time that a transaction is valid and thereby obtained some advantage, to which he could only be entitled on the footing that it is valid and then turned round and say it is void for the purpose of securing some other advantage, to approbate and reprobate the transaction. In Halsbury's laws of England Vol.13, page: 454 para 572, the principle has been described as species of estoppels. The said principle has also been accepted in C. Bwepathuma v. Velasine S. Kadamboli phaya 159 MANU/SC/0209/1963 : AIR 1965 SC 241 at para 17&18. The Apex Court further observed in R.N. Gosain v. Yashpal Dhir MANU/SC/0078/1993 : AIR 1993 SC 352 as follows: "Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid any thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage".

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15(g). Coming to the admissions - Admissions are relevant and must be read as a whole and cannot be split up to rely upon a part of statement to the advantage to ignore the other part which is to the disadvantage of same party. The word 'admission' has been defined under Section 17 of the Indian Evidence Act as follows:- "An admission is a statement, oral or documentary or contained in electric form, which suggests any inferences as to any fact in issue or relevance fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned".

15(g)(i). In Wigmore's Evidence, 1095 Ed., Page 1226, the word 'admission' has been defined as follows:- An "Admission" in the correct sense is a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence by conceding for the purposes of litigation that the proposition of fact claimed by the opponent is true"

15(g)(ii). Order VIII Rules 3-5 of C.P.C. envisage that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability. There is no other provision in C.P.C. imposing such a condition on the plaintiff to deny the allegations of fact made by the defendants in their written statement.

15(g)(iii). Order XX Rule 6 of C.P.C. envisages passing of decree on admissions to the extent admitted, to put the parties to trial for rest of the lis, if any.

15(g)(iv). Thus, admission means admitting the fact which is asserted by other party. When a party pleads that there is a partition and when the other side disputes the same, it becomes a disputed fact and when it is a disputed fact, the Court has to give a finding on the said disputed fact. Of course, at a subsequent stage, a party cannot be permitted to take a contra stand to the earlier stand taken by said party. However, the admissions can be explained away and retracted. Thus, in placing reliance on admissions, conduct of the parties and all subsequent events have to be conjointly examined and reasonable conclusions basing on the probabilities of the case have to be drawn to decide how far to

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rely in appreciation of evidence, being relevant and otherwise conclusive.

15(g)(v). It is well laid down in Karuna Kapali v. M/s. Lalchand PC Trust MANU/SC/0240/2010 : 2010(3) Scale 569 in dealing with relevancy and importance of pleadings and binding nature on facts admitted need not be proved under Section 58 read with Sec.17 and 21 of the Indian Evidence Act r/w. Order VIII Rules 3-5 CPC and Order XII Rule 6 CPC. See also- Sajjana Granites v. M.S. Rao MANU/AP/0147/2002 : 2002(1)-ALT-466(DB) at para 34.

15(g)(vi). In P.S. Sairam and another v. P.S. Rama Rao Pisey MANU/SC/0085/2004 : AIR 2004 SC 1619 & Hardeo Rai v. Shakuntala Devi MANU/SC/7540/2008 : AIR 2008 SC 2489 - it was held that an admission made by a person cannot be split up for only part of it can be used against the maker. In fact, the correct meaning of the word 'admission' appears to be when a party in proceedings has made a statement or taken a stand and when the other side has admitted the same as true, the same amounts to admission. Thus, even when a party admits the plea or the stand of a party in earlier proceedings, the same also can be treated as an admission.

15(g)(vii). Further in Bharat Singh v. Mst. Bhagiradhi MANU/SC/0362/1965 : AIR 1966 SC 405 at para 7 at Para 19-it was held by the three judge Bench of the Apex Court on admissions and its relevancy that, admissions have to be clear if they are to be used against the person making them. Admissions are substantive evidence by themselves, in view of Sections 17 to 21 of the Indian Evidence Act, though party is not confronted with the statement and in such case the weight to be attached to it is a different matter. It is to say their evidentiary value is very weak and as such those are not conclusive proof of the matters admitted. It was held that, admissions duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contradicting witness u/sec.145 of Indian Evidence Act is very much different from the purpose of proving the admission. Admission is

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substantive evidence of the fact admitted, while previous statement used to contradict the witness does not become substantive evidence and merely serves purpose of throwing doubt on the veracity of the witness. Thus, what weight is to be attached to an admission made by a party is a matter different from its use as relevant and admissible evidence.

15(h). Then coming to adverse possession claim, in Karnataka Board of Wakfs v. Government of India (2004) 10 SCC 639 it was held that adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is "nec-vi, nec-clam, nec-precario", that is peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. Physical act of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors, which are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law, but a blended one of fact and law. Therefore, a person who claims adverse possession should show - a) on what date he came into possession, b) what was the nature of possession, c) whether the factum of possession was known to the other party, d) how long his possession is continued and e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour, since he is trying to defeat the rights of the true owner, thus it is for him to clearly plead and establish all facts necessary for adverse possession - vide decisions: S.M. Karim v. Bibisakina MANU/SC/0236/1964 : AIR 1964 SC 1254, Parsinni v. Sukhi MANU/SC/0575/1993 : 1993 (4) SCC 375, D.N. Venkatarayappa v. State of Karnataka MANU/SC/0766/1997 : 1997 (7) SCC 567, Maheshchand Sarma v. Rajkumar Sarma MANU/SC/0231/1996 : 1996(8) SCC 128 and P. Periaswamy v. P. Periathambi MANU/SC/0821/1995 : 1995(6) SCC 523. In Nakkalapu Annapurnamma v. N.N. Kumar 1997(4) ALD 97 DB - it was held that possession obtained through invalid sale by vendee can set up adverse possession against the vendor from that date as said possession is with own right to acquire title by adverse

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possession after statutory time. However, mere length of possession does not constitute adverse possession in the absence of animus possidendi- See also Maherndra C. Mehta v. Kousalya Co-op Housing Society Ltd. 2001(5) ALT-102, at para-15 in pointing out the distinction between Old Limitation Act,1908 Articles 136-144 & New Limitation Act,1963 Articles 64 & 65, in particular Article 144 (old) replaced by Article 65 (new) and with reference to Sections 27 & 28 (new) and by placing reliance upon J. Manikyam v. K. Tatayya 1992 APHN 244, Bhagwathi Pillai v. Savarimuthu AIR 1976 SC 121, Mahavir v. Pural Institute MANU/SC/0763/1995 : 1995(5) SCC 335 & P. Periaswamy (supra). It was also held categorically at paras-19&19A that entries in the revenue records do not confer any title on the person in whose name is entered therein; nor do they extinguish right of the real owner, when the land is shown to be fallow and uncultivated.

15(i). Coming to adverse possession among co-owners, on the doctrine of ouster, possession of one co-owner is possession of all on the basis of joint title of all on the principle that co-owner in possession would become constructive trustee on behalf of the others not in possession and even mere mutation in name of one among those no way a ground to take plea of adverse possession much less setting up secret hostile animus on his own part in derogation to other's title and or ouster of the right of others therefrom, unless there has been a clear ouster by denying title of other co-owners to their knowledge, vide decisions - Balvanth Singh v. Dowlath Singh MANU/SC/0736/1997 : AIR 1997 SC 2719, Karbalai Begum v. Mohd. Sayeed MANU/SC/0363/1980 : AIR 1981 SC 77, P.Lakshma Reddy v. L.Lakshmi Reddy MANU/SC/0083/1956 : AIR 1957 SC 314, Gaddem Chinna Dodamma v. Goka Pedda Doramma MANU/AP/0262/2005 : 2005 (3)ALD 531=3 ALT 619 and Raghunath pershad v. Janakibai MANU/AP/0607/2005 : 2005 (6)ALD 161. In Tricon partners v. Smt. Mandala Neeraja MANU/AP/1271/2012 : 2013 (2) ALT 268 para 7 it was held that to set up ouster among coparceners as purchaser from one of co-parceners as own, their possession should be for 12 years continuous and they cannot count the possession of vendor as their possession. So also the decision of Modadugu Venkata Subbamma v. Kana Marlapudi Rattaiah

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2008(6) ALD 2002 that the alienation of joint family property must be for benefit of the estate to bind other coparceners; so also the decisions of Vadla Krishnaiah v. Nalli Narasimha Reddy 1976 (2) APLJ page 16 and Manikyala Rao AIR 1956 SC 470 holding (by referring to Siddeswar Mukharji MANU/SC/0089/1953 : AIR 1953 SC 487, permanayakam MANU/TN/0197/1952 : AIR 1952 Mad.419 and Achayya v. Venkata Subba Rao AIR 1957 AP page 8) that the purchaser of undivided share of co-parceners cannot acquire any interest in specific item of properties and claim to be put in possession that any definite piece of the family property, but for acquires on equity to step into the alienor's shoes and work out his rights by partition as the tenant in common, he cannot even in joint possession with other co-parceners and thereby cannot even claim protection under Section 53-A of the T.P. Act. Thus, so far as item No. 7 of plaint schedule, there is no adverse possession, but for plaint schedule item No. 1 even it is taken proved of joint property, against plaintiffs by defendant.

15(j). Regarding presumption of joint family property, sufficiency of nucleus, jointness in a family, disruption and burden of Proof:

"15(j)(i). In Appasahab Peera Chamdgade v. Devendra Peerappa Chamdgade MANU/SC/8597/2006 : 2007(1) SCC-521 - it was held at Paras 12-17 - referring to Shrinivas KK v. Narayn DK (three judge Bench), MANU/SC/0126/1954 : AIR 1954 SC 379 Mst. Rukhmabai (three judge Bench-supra), Atchuthan Nair v. Chinnamu Amma MANU/SC/0361/1965 : AIR 1966 SC 411, Bhagwath P. Sulake v. Digambar Gopal Sulake MANU/SC/0267/1985 : AIR 1986 SC 79 and Surendrakumar v. phoolchand MANU/SC/0307/1996 : 1996(2) SCC 491 : AIR 1996 SC 1148 that, the initial burden is on plaintiffs to show that the property is joint family property and then it shifts on the defendants to show that the property claimed by them was not purchased from out of the joint family nucleus and it was purchased independent of them. On facts held the defendants failed to establish any sufficient funds out of which they could acquire any of those claimed as own and thereby held all the suit properties are joint family partiable properties.

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15(j)(ii). In Mst. Rukhmabai(supra), it was held in para-5 that, there can be division in status among the members of a joint family by definement of shares which is technically called division in status or an actual division among them by allotment of specific property to each one of them which is described as division by metes and bounds. A member need not receive any share in the joint estate but may renounce his interest therein; his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members' vis-à-vis the family property. A division in status can be affected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of a joint family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which said property could have been acquired, the burden shifts on the members of the family setting up the claim that it is his personal property to establish that said property has been acquired without any assistance from the joint family property.

15(j)(iii). In Mudigowda Gowdappa Sankh v. Ramachandra Revgowda Sankh MANU/SC/0289/1969 : AIR 1969 SC 1076 also the Supreme Court observed thus: The law on this aspect of the case is well settled, of course, there is a presumption that there is a Hindu joint Family; however, there is no presumption that Hindu family merely because it is joint it possesses any joint property. The burden of proving that any particular property is joint family property is therefore, in the first instance upon the person who claims it as Coparcenary property. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be the joint family property. This is however subject to the

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limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown; that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate-see also Rajendra Nath Majhi v. Tustu Charan Das. AIR 1969 Calcutta 105

15(j)(iv). In Jamunabai v. Saradhabai MANU/AP/0618/1998 : 1998(4) ALD 655 it was held at para-17 relying upon Mudigowda Gowdappa Sankh (supra) and Appalaswamy v. Suryanarayana Murthy MANU/PR/0051/1947 : AIR 1947 PC 189, that there is no presumption that property standing in the name of one of the members of the joint family is the self-acquired property of him, when evidence is showing existence of nucleus to acquire the property in the absence of proof of self-acquired property to hold as part of joint family property.

15(j)(v). In Kakumani Subbarao v. Venkateshwarlu MANU/AP/0466/2012 : 2012(5) ALD 161 it was held that in the suit for partition filed by the plaintiff claiming some of the items as self-acquired and the other items that are partiable, the defendant's plea that those also part of the joint family properties, where plaintiff and defendant living together till date of suit, initial burden is on the defendants to show joint family possessed sufficient nucleus with which said property could have been acquired; and if it is shown of sufficient nucleus burden would immediately shift on to the plaintiff to show that the property was not joint family property, but his self-acquired property; and in the absence of clinching evidence from his side very establishment of sufficient nucleus for joint family property would attract presumption that the property is joint family property as mere recitals in the sale deed stands in the name of the plaintiff does not draw a presumption of plaintiff is owner of the properties. The admissions in the suit in pleadings and evidence by a party can be relied upon by the other party to the suit in proof of respective claims.

15(j)(vi). It was also held in the division bench expression of this Court in the year, 2008 in Jayan v. Jayala Laxman MANU/AP/0055/2008 : 2008 (3) ALD 657 DB at Para 21 that, it

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is the settled proposition that, property cannot be presumed to be joint family property from existence of joint family as burden of proof. The property as the joint family property always lies on the person who so asserts, however, once he proves that the family possessed sufficient nucleus and with aid of which the suit properties could be acquired, then presumption has to be drawn that the properties are joint and consequently the burden of proof shifts on the person claiming to be his self acquired.

15(j)(vii). In P. Subbalakshmi v. P. Ramya MANU/AP/0413/2010 : 2011(1) ALT 256 - it was held in the partition suit regarding burden of proof on the claim of self-acquisition by one of the members of the joint family with coparcenary, that even while being a coparcenary in a joint family it was permissible for the defendant to acquire properties by himself and oppose any steps for partition thereof, that could have been possible if only he has established through cogent evidence that he is possessed of adequate means and had necessary funds at his disposal to purchase the properties.

15(j)(viii). In K.V. Narayanaswami Iyer v. K.V. Ramakrishna Iyer MANU/SC/0307/1964 : AIR 1965 SC 289 also it was held with reference to the presumption that, properties in the name of any member of the family are of with the family funds and that such property would constitute and form part of the joint family property, if it is shown that the joint family has sufficient nucleus. See also - Pabbathi Anjaneyulu v. Pabbathi N.Rathnamaiah Chetty MANU/AP/0281/2005 : 2005 (4) ALD 291; D.S. Lakshmaiah v. L. Balasubramanyam MANU/SC/0639/2003 : (2003) 10 SCC 310; Srinivas Krishnarao Kango v. Narayan Devji Kango AIR 1954 SC 397(1) and Mst. Rukhmabai (supra).

15(j)(ix). In Kasaram Jayamma v. Jajala Lakshmamma MANU/AP/0055/2008 : 2008(3) ALD 657 DB also it was held that, once it is shown property is joint, the presumption to be drawn is that other acquisitions are also joint and the burden is on the person claiming to be self-acquired, so to prove.

15(j)(x). In Nakkarapu Annapurnamma(supra) it was held that, though there is no presumption that a family because it is joint possessed joint family property and thereby the person

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alleging the property to be joint has to establish that family possessed of some property with the income of which the property could have been acquired, which is a rebuttable presumption of fact. But where it is established or admitted that family possessed joint property which form its nature and relative value may form sufficient nucleus from which the property in question may have been acquired, the presumption arises that it is the joint family property and the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family and to that proposition placed reliance upon the expression of the Apex Court in Surendrakumar (supra).

15(j)(xi). In Sher Singh v. Gamdoor Singh MANU/SC/0306/1997 : AIR 1997 SC 1333 - it was held at para-5 that, once existence of the joint family is not in dispute, necessarily the property held by the family assumed the character of a coparcenary property and every member of the family would be entitled by birth to a share in the coparcenary property unless any one of the coparceners pleads by separate pleadings and proves that some of the properties or all the properties are his self-acquired properties and could not be blended in the coparcenary property.

15(j)(xii). In Appasahab Peera Chamdgade (supra) at Para 15 referring to Bhagwath P.Sulake (supra) it was specifically held that, the character of any joint family property does not change with the severance in status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By a unilateral act, it is not open to any member of the joint family to convert any joint family property into his personal property.

15(j)(xiii). In Shankara Rao Daiji Saheb Shinde v. Vithalrao Ganpathro Shinde MANU/SC/0495/1989 : AIR 1989 SC 879 - it was observed that, there is a presumption of jointness in a family governed by Hindu Mitakshara Law and that the initial burden lies on the party who alleges partition that the members of HUF had separated to prove the same, to support his claim of disruption in the joint Status-see also Sital Singh v. Ram Prasad Singh MANU/BH/0119/1957 : AIR 1957 Patna 398(DB).

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15(j)(xiv). In Awadh Ram Singh v. Mahaboob Khan AIR 1924 Oudh 255 - it was held that the burden is on the person to prove separation and even mutation of the joint family property in favour of individual members of the family, unsupported by other circumstances of division, do not raise a presumption of separation.

15(j)(xv). In Maherndra C. Mehta (supra) it was also held categorically at paras-19&19A that entries in the revenue records do not confer any title on the person in whose name is entered therein; nor do they extinguish right of the real owner, when the land is shown to be fallow and uncultivated.

15(j)(xvi). The Allahabad High Court clarified in Ram Gopal v. Smt. Maya Devi MANU/UP/0031/1978 : AIR 1978 Allahabad 119 - that it would not be possible always to establish the date of ancient partition, however, the execution of sale deed by the members of the family together with recitals of partition would be decisive to establish whether partition had not been effected or otherwise.

15(j)(xvii). Further in Bharat Singh v. Mst. Bhagiradhi MANU/SC/0362/1965 : AIR 1966 SC 405 Para 7 at Para 7, it was held by the three judge Bench of the Apex Court that, there is a strong presumption in favour of the Hindu brothers constituting a joint family. It is for the person alleging severance of the joint family to establish it. The mere fact that mutation entry made in favour of widow of one of the three brothers indicating share of each to be 1/3rd by itself can be no evidence of severance of joint family or partition.

15(j)(xviii). In Ratnam Chettiar v. SMK Chettiar MANU/SC/0540/1975 : AIR 1976 SC 1 - it was held that where partition deed executed of the partition effected between members of the Hindu Undivided Family by their own volition, it cannot be reopened unless it is shown that the same is obtained by fraud, coercion, misrepresentation or undue influence and in such a case, the Court should require a strict proof of facts because an act inter-vivos cannot be lightly set aside. Even some of the family members are minors if it is done in good faith keeping the interest

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of the minors and bona fide, unless it is proved to be unjust and unfair and detrimental to the interest of such minors to reopen. As it is the duty of the Court to protect and safeguard the interests of the minors and the onus of proof that the partition was just and fair is on the party supporting the partition.

15(j)(xix). In Bishnudeo v. Seogeni Rai MANU/SC/0059/1951 : AIR 1951 SC 280 - it was held of the well established principle that a minor can sue for partition and obtain a decree if his next friend can show that it is for the minor's benefit. It is also beyond dispute that an adult coparcener can enforce a partition by suit even when there are minors. Even without a suit, there can be a partition between members of the joint family when one of the members is a minor. In the case such lastly mentioned partitions, where a minor can never be able to consent to the same in law, if a minor on attaining majority is able to show that the division was unfair and unjust the Court will certainly set it aside.

15(k)(i). On the separate business of coparceners, when constitutes family business and when not concerned; in G.Narayanaraju v. G. Chamaraju MANU/SC/0113/1968 : AIR 1968 SC 1276 -it was held by the Apex Court(three judge Bench) referring to Chattanatha Karayalar v. Ramachandra Iyer MANU/SC/0050/1955 : AIR 1955 SC 799 and Bhurumal v. Jagannadh AIR 1942 PC 13 that, there is no presumption under Hindu law that a business standing in the name of any member of the joint family is a joint family business unless it could be shown that the business of the coparcener grow up with the assistance of the joint family property or joint family funds or that the earnings of the business were blended with the joint family estate, the business remains free and separate.

15(k)(ii). Separate acquisitions by coparceners when constitutes family property and when not concerned; in Madanlal v. Yoga Bai MANU/SC/0161/2003 : AIR 2003 SC 1880 - it was held by the Apex Court, confirming the findings of the Andhra Pradesh High Court's expression in Poornabai v. Ranchhoddas MANU/AP/0042/1992 : AIR 1992 AP 270 DB (of nature of joint family property does not change merely because coparceners live separately and in the absence of proof by filing sale deeds and examination of witnesses of purchase with self earnings to support

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the plea of purchased from own earnings of self business income as self-acquired property, the properties be held as joint family properties, from the business in different names is the family business and the subsequent acquisitions are made out from out of the profits and earnings of the said business with the joint efforts of the father and sons that constitutes joint family properties amenable for partition), that "it is sought to be established that they have been running their business separately under different partnerships. We feel that no such inference can be drawn. Mere family carries on a number of business, it is quite often that it is carried out under different names and styles and often constitutes different companies are partnerships for better handling of business or to keep it manageable or for various other reasons. It is no proof of separation nor are the letters which are sought to be relied upon written to the income tax authorities and the assessment orders passed by the income tax authorities. Therefore, once the family settlement before the suit for partition was filed is not accepted by means of a finding of fact recorded by the High Court, the case of the defendant falls through."

15(l). On the doctrine of blending, it was held in G.Narayanaraju (supra) that, even property originally self-acquired may become joint property if it has been voluntarily thrown by the coparcener into the joint stock with the intention of abandoning all separate claims up on it. Such intention can be discovered only from the words or acts and conduct.

WHEN SOURCE OF TITLE IS NOT DISCLOSED – MERE STATEMENT WITHOUT PROOF OF DOCUMENT AS TO SOURCE OF TITLE IS NOT RELEVANT

Prabhakar Adsule vs State Of M.P. & Anr 2004 AIR 3557 = 2004 (11) SCC 249 In the plaint the source of Somaji's title was not disclosed and it was merely stated that he was owner of the disputed land and the same was coming in his possession since 1918. In his statement in Court, the plaintiff came out with a case that the land had been given by way of grant. However, the plaintiff did not lead any kind of evidence to prove the factum of grant. No

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document was produced to show that the land had been given by way of grant either to Somaji or to his ancestors.

Bench: N Kumar in M.A. Sreenivasan vs H.V. Gowthama And Anr. ILR 2005 KAR 1138 Therefore the law on the point is well settled. The probate Court will not go into question of title of the property which is bequeathed under the will. It is totally outside the scope of enquiry in a probate proceedings. If the testator has a right in the property the beneficiary gets that right on the death of the testator under the will. Grant of probate do not divest any person of his title to the property not vest title in the beneficiary under the Will. The scope of enquiry in a probate proceedings is only to find out whether the will sought to be probated has been duly executed by the testator and is proved in accordance with law and the statutory requirements under the Act have been complied with. Therefore grant of probate in no way affects the right of the person who claims title to the property independently or adverse to the interest of the testator. It does not decide any question of title or the existence of the property itself.

Hon'ble Supreme Court as reported in Chandradhar Goswami & Ors. v. The Gauhati Bank Ltd., ,... **1967 AIR 816, 1967 SCR (1) 921**" Section 4 of the Bankers' Books Evidence Act (18 of 1891) certainly gives a special privilege to banks and allows certified copies of their accounts to be produced by them and those certified copies become prima facie evidence of the existence of the original entries in the accounts and are admitted as evidence of matters, transactions, and accounts therein. But such admission is only where and to the extent as the original entry itself would be admissible by law and not further or otherwise. Original entries alone under S.34 of the Evidence Act would not be sufficient to charge any person with liability and as such, copies produced under s.4 of the Bankers' Books Evidence Act could not charge any person with liability. ..... Original entries alone under s. 34 of the Evidence Act would not be sufficient to charge any person with liability and as such copies produced under s. 4 of the Bankers'

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Books Evidence Act obviously cannot charge any person with liability. Therefore, where the entries are not admitted it is the duty of the bank if it relies on such entries to charge any person with liability, to produce evidence in support of the entries to show that the money was advanced as indicated therein and thereafter the entries would be of use as corroborative evidence. But no person can be charged with liability on the basis of mere entries whether the entries produced are the original entries or copies under s. 4 of the Banker's Books Evidence Act. "

In Zenna Sorabji and others Vs. Mirabelle Hotel Co.(Pvt.) Ltd. and others, **AIR 1981 Bom 446** , ..."In order that a document could be relied upon as a book of account, it must have the characteristic of being fool-proof. A bundle of sheets detachable and replaceable at a moment's pleasure can hardly be characterised as a book of account. Moreover what Section 34 demands is a book of account regularly maintained in the course of business. A ledger by itself could not be a book of account of the character contemplated by Section 34."

Hon'ble Supreme Court in Ramji Dayawala & Sons (P) Ltd. v. Invest Import, **1981 AIR 2085, 1981 SCR (1) 899**, ..." Undoubtedly, mere proof of the handwriting of a document would not tantamount to a proof of all the contents or the facts stated in the document, if the truth of the facts stated in a document is in issue mere proof of the handwriting and execution of the document would not furnish evidence of the truth of the facts or contents of the document. The truth or otherwise of the facts or contents so stated would have to be proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue."

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A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. (Vide: United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal, AIR 2004 SC 4794; Polymat India P. Ltd. & Anr. v. National Insurance Co. Ltd. & Ors., AIR 2005 SC 286).

In DLF Universal Ltd. & Anr. v. Director, T. and C. Planning Department Haryana & Ors., AIR 2011 SC 1463, this court held:

“It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. ?It comprises joint intent of the parties. Every such contract expresses the autonomy of the contractual parties’ private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation. As is stated in Anson's Law of Contract, "a basic principle of the Common Law of Contract is that the parties are free to determine for themselves what primary obligations they will accept...Today, the position is seen in a different light. Freedom of contract is generally

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regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed and no injury is done to the interests of the community at large." The Court assumes "that the parties to the contract are reasonable persons who seek to achieve reasonable results, fairness and efficiency...In a contract between the joint intent of the parties and the intent of the reasonable person, joint intent trumps, and the Judge should interpret the contract accordingly."

The phrase, "as is-where-is", has been explained by this Court in Punjab Urban Planning & Development Authority & Ors. v. Raghu Nath Gupta & Ors., (2012) 8 SCC 197, holding as under: "We notice that the respondents had accepted the commercial plots with open eyes, subject to the abovementioned conditions. Evidently, the commercial plots were allotted on "as-is-where-is" basis. The allottees would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on "as-is- where-is" basis, they cannot be heard to contend that PUDA had not provided the basic amenities like parking, lights, roads, water, sewerage, etc. If the allottees were not interested in taking the commercial plots on "as-is-where- is" basis, they should not have accepted the allotment and after having accepted the allotment on "as-is-where-is" basis, they are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage, etc. were not provided by PUDA when the plots were allotted..."

MERE PRODUCTION AND MARKING OF A DOCUMENT AS EXHIBIT BY THE COURT CANNOT BE HELD TO BE A DUE PROOF OF ITS CONTENTS

Narbad Devi Gupta Vs. Birendra Kumar Jaiswal JT (2003) 8 SC 267 laying down that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its

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contents till its execution has been proved by admissible evidence i.e. by the evidence of those persons who can vouchsafe for the truth of the facts in issue;

DOCUMENTARY EVIDENCE – PRIMARY - SECONDARY

M. Chandra v. M. Thangmuthu and another, AIR 2011 SC 146: On the issue of proof by secondary evidence, it was held by Hon'ble the Supreme Court that it is true that a party who wishes to rely upon the contents of a document must adduce primary evidence of the contents, and only in the exceptional cases will secondary evidence be admissible. However, if secondary evidence is admissible, it may be adduced in any form in which it may be available, whether by production of a copy, duplicate copy of a copy, by oral evidence of the contents or in another form. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original. It should be emphasized that the exceptions to the rule requiring primary evidence are designed to provide relief in a case where a party is genuinely unable to produce the original through no fault of that party.

Bank of India v. M/s Allibhoy Mohammed and others, AIR 2008 Bombay 81: Hon'ble the Supreme Court held that the document produced as primary or secondary evidence has to be proved in a manner laid down in Sections 67 to 73 of the Evidence Act. With regard to secondary evidence, it has been held that the same cannot be accepted unless sufficient reason given for non-production of original. The loss of original document must be shown in order to lead secondary evidence. Secondary evidence of the document can be allowed to be lead only where original is proved to have existed but was lost or misplaced. The prior permission of the Court is required to be taken for producing secondary evidence of the documents on the grounds that original documents were lost. When anybody wants to lead secondary evidence, two things are required to be proved; there must be

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evidence of the existence of the original documents and there must be evidence of their loss.

Smt. J. Yashoda v. Smt. K. Shobha Rani, AIR 2007 SC 1721: In this case, the documents in question were admittedly photocopies and there was no possibility of said documents being compared with original as same were with another person. On the point of admissibility of such documents as secondary evidence, it was held by Hon'ble the Supreme Court that conditions in Section 65(a) of the Evidence Act had not been satisfied, therefore, the documents cannot be accepted as secondary evidence. It was further observed that Section 65 of the Evidence Act permits secondary evidence to be given of the existence, condition or contents of documents under the circumstances mentioned. The conditions laid down in the said Section must be fulfilled before secondary evidence can be admitted. Secondary evidence of the contents of a document cannot be admitted without non-production of the original being first accounted for in such a manner as to bring it within one or other of the cases provided for in the Section.

Kaliya v. State of Madhya Pradesh, 2013 (3) R.C.R. (Criminal) 958: Hon'ble the Supreme Court held that Section 65(c) of the Evidence Act provides that secondary evidence can be adduced relating to a document when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason, not arising from his own default, or neglect, produce it in reasonable time. The court is obliged to examine the probative value of documents produced in court or their contents and decide the question of admissibility of a document in secondary evidence. It was further observed that however, the secondary evidence of an ordinary document is admissible only and only when the party desirous of admitting it has proved before the court that it was not in his possession or control of it and

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further, that he has done what could be done to procure the production of it. Thus, the party has to account for the non-production in one of the ways indicated in the section. The party further has to lay down the factual foundation to establish the right to give secondary evidence where the original document cannot be produced. When the party gives in evidence a certified copy/secondary evidence without proving the circumstances entitling him to give secondary evidence, the opposite party must raise an objection at the time of admission. In case, an objection is not raised at that point of time, it is precluded from being raised at a belated stage. Further, mere admission of a document in evidence does not amount to its proof and mere marking of exhibit on a document does not dispense with its proof, which is otherwise required to be done in accordance with law.

Pratap Kishore and another v. Gyanendranath, AIR 1951 Orissa 313: A Division Bench of Orissa High Court in this case has held that where certain documents have been marked as exhibits in a case without objection but the contents thereof have not been put to the persons connected with them either in their chief examination or cross-examination, it is not possible to make use of the statements made therein for the purpose of drawing inferences one way or the other.

DOCUMENTARY EVIDENCE AT APPEAL STAGE

In Billa Jagan Mohan Reddy and another v. Billa Sanjeeva Reddy and others, (1994) 4 SCC 659, Hon'ble the Supreme Court opined that if the documents are found to be relevant to decide the real issue in controversy and when the court feels that interest of justice requires that the documents may be received, exercising the power under Order 41 Rule 27 CPC, the appellate court would receive those documents and consider the effect thereof. However,

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an opportunity be given for rebuttal, if any, and their relevance and effect be considered in deciding the issues arising in controversy.

In Ram Kishan v. Inder Pal and others, 2004(3) RCR (Civil) 572, (P & H) court, while considering the issue regarding production of additional evidence at the appellate stage, observed as under: "5. The afore-mentioned provision have been subject-matter of interpretation of the Supreme Court in the case of K. Venkataramiah v. A. Seetharama Reddy and others, AIR 1963 SC 1526; Natha Singh v. The Financial Commissioner, Taxation, AIR 1976 SC 1053; Land Acquisition Officer v. H. Narayanaiah etc., AIR 1976 SC 2403 and P. Purushottam Reddy and another v. Pratap Steels Ltd., (2002(2) RCR (Civil) 70 (SC): 2002(2) SCC 686. On the basis of the afore-mentioned judgments it can be concluded that the Ld. Additional District Judge while hearing the appeal under Section 96 of the (sic) enjoys adequate power to allow additional evidence if such evidence is required to enable him to pronounce the judgment. He can also allow the additional evidence for any other substantial cause advancing administration of justice. The judgment of the Rajasthan High Court in the case of Vishnu Iron and Steel Industries's case (supra) on which reliance has been placed has also concluded that the first appellate court has adequate power to allow additional evidence if such evidence is necessary to pronounce the judgment."

In North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (D) by Lrs, 2008(3) RCR (Civil) 165, the issue has been considered in detail by Hon'ble the Supreme Court and certain broad principles were laid down, namely, acceptance of application may not result in injustice to other party and that it is necessary for the purpose of determining the real question in controversy between the parties. Relevant paragraphs thereof are extracted below: "14. Again in K. Venkataramiah v. A. Seetharama

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Reddy & Ors., AIR 1963 SC 1526 a Constitution Bench of this court while reiterating the afore-noted observations in Parsotim's case (supra), pointed out that the appellate court has the power to allow additional evidence not only if it requires such evidence 'to enable it to pronounce judgment' but also for 'any other substantial cause'. There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence 'to enable it to pronounce judgment', it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Thus, the question whether looking into the documents, sought to be filed as additional evidence, would be necessary to pronounce judgment in a more satisfactory manner, has to be considered by the court at the time of hearing of the appeal on merits.

15. Insofar as the priniciples which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil & Ors., AIR 1957 SC 363 which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions:

(a) of not working injustice to the other side, and

(b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. (Also see: Gajanan Jaikishan Joshi v. Prabhakar Mohanlal Kalwar, 1990(1) RCR (Rent) 229: 1990(1) RRR 222: 1990 Civ. C.C. 277 (SC).

16. These are the broad principles to be kept in view while dealing with applications under Order 41 Rule 27 and Order 6 Rule 17 CPC.

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PROPER APPRECIATION OF DOCUMENTS AND EVIDENCE

THE HON'BLE MR. JUSTICE SUBHASH B. ADI of Karnataka High Court in the case of R Laxman vs M S Lingegowda Since Dead By Lrs Decided on 13 February, 2013 - No doubt, the pleadings in the plaint do not show that the plaintiff has stated the source of his title to the suit schedule property. The entire pleadings show that the plaintiff has based his claim only on the basis of the revenue records. However, during the course of his evidence, he sought to produce Ex.P20, which stands in the name of the uncle of the plaintiff and he claimed that, there was subsequent partition and the suit schedule property had fallen to his share, however, such a pleading is not forthcoming in the plaint. ..... However, the plaintiff admittedly, has produced Exs.P1 to P6 and it shows the plaintiff`s name in the cultivator`s column and in the kabzedar`s column, the name of the brother of the plaintiff is shown. Under Section 133 of the Karnataka Land Revenue Act, the entries in the revenue records create presumption that they are true, unless rebuttable evidence is led. Ex.D2 is a pahani, wherein the name of defendant No.4, one of the legal representatives of the original defendant is shown in the cultivator`s column. It is not known as to how for the first time in 1982-1983, the name of defendant No.4 is entered. ..... The trial Court, without referring to the entries in the said documents and without referring to Survey Nos., only on the ground that there was an order passed by the Appellate Tribunal against the brother of the plaintiff, has dismissed the suit. ..... In my opinion, the trial Court has utterly failed to appreciate the evidence on record in the proper perspective. When there is a dispute between the parties, the better title between the parties has to be ascertained and to appreciate the same, the trial Court should have looked into the oral as well as the documentary evidence of both the parties. Even the documents referred to by the trial Court have been wrongly understood.

PROVE BY ACCEPTABLE EVIDENCE THAT THE EXECUTANT AFFIXED HIS SIGNATURE TO THE DOCUMENT AFTER BEING AWARE OF THE CONTENTS OF THE DOCUMENT

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Mariam Hussain W/O. Zaheed Hussein vs Syedani W/O. Late Syed Mustafa And Ors. ILR 2007 KAR 2715 JUSTICE N. KUMAR OBSERVED: It is to be noticed here that Ex.P-1, is not a simple agreement of sale entered into between the parties voluntarily where one party is interested in selling his property and the other interested in purchasing the property, after mutual discussion and negotiation agreed on a price and then reduce the terms in writing. It is a case of want of consensus ad-idem. Similarly execution of a document does not mean signing of a document. The word "execution" has a definite connotation in law. The person signing the document must be aware of the contents of document and consciously sign the document in token of acceptance of the contents of the said document. If the execution of a document is denied it is for the party who alleges the due execution to prove by acceptable evidence that the executant affixed his signature to the document after being aware of the contents of the document and in token of its acceptance so as to bind him. When it is stated that the executant executed an agreement of sale it must be shown that the executant had agreed to sell the property end in token of acceptance of such agreement he has affixed his signature on the said agreement of sell. The evidence on record do not disclose that the defendant affixed his signature to the the suit document agreeing to sell the schedule property in favour of the plaintiffs or in view of the decision of Panchayatdars or on the basis of what was agreed to in the said Panchayat. Therfore the finding of the courts below that the agreement of sale is duly executed by the first defendant, as it bears his signature on the document is illegal. ..... The material on record disclose that this property was granted to the first defendant 30 years prior to the date of the suit. Mutation entries were made in his name. Attempt to delete the said mutation entry by the plaintiff was not successful. The defendant also obtained a decree of permanent injunction against the plaintiff. The material on record shows that he was cultivating the land and he has raised (sic) trees and on 18.08.1982 he has handed over possession of the property from that day till today. Ignoring all

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these material evidence on record only relying on the interested testimony of the plaintiff and his witness, whose evidence, as already stated do not infuse confidence, the courts below have recorded a finding that the plaintiff is in possession and the first defendant in not in possession. The said finding is perverse and capricious and cannot be sustained.

Chapter VI of the Karnataka Land Revenue Act, 1964 (hereinafter called 'the Act') deals with maintenance of Record of Rights. Section 128 deals with acquisition of rights to be reported, Section 129 deals with registration of Mutations and the procedure for such registration, Section 129A deals with issue of patta book containing the copy of the Record of Rights pertaining to such land. Section 130 deals with the obligation to furnish information for compilation or revision of the Record of Rights and as to the bar of suits against the State Government or its officials in respect of daims for having the entry made in the Record of Rights, reserving expressly the right to seek a correction of the entry in the Record of Rights against persons who are interested in denying such a right. It is clear from the above provisions that the entries in the Record of Rights made after enquiry as provided for in Section 129 of the Act is always subject to a final adjudication of the rights between the parties to the land in question. At this stage, it is also necessary to observe and reiterate that the enquiry is essentially summary in nature.

SUB-REGISTRAR HAS NO OPTION BUT TO REGISTER THE DOCUMENT UNLESS THE DOCUMENT IS NOT IN CONFORMITY WITH THE PROVISIONS OF THE INDIAN REGISTRATION ACT OF 1908

Smt. Sulochanamma v. H. Nanjundaswamy and others [MANU/KA/0026/2001 : 2001 (1) KLJ 215], it has been held that when a document is presented for registration fulfilling all requirements, the Sub-Registrar has no option but to register the document unless the document is not in conformity with the

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provisions of the Indian Registration Act of 1908 and the relevant rules. In the said case, the registration of the deed was refused on the basis of the communication received from the Tahsildar that the revenue documents were all bogus and false. It was held that the Sub-Registrar was entrusted with the duty of registering the documents in accordance with the provisions of the Act and he was not authorised to go into the genuineness or otherwise of the documents presented before him. If the documents are bogus or false, the party affected by it will have the right to initiate both civil and criminal proceedings to prosecute the party who tries to have benefit from such document and also to safeguard his right, title and interest. It was not for either the Tahsildar or the Sub-Registrar to express opinion as to the genuineness or otherwise of the documents, unless called upon by the Court of law or any other authorised investigating agency were the observations in the said case.

S. Sreenivasa Rao v. Sub Registrar [MANU/KA/0456/1990 : ILR 1990 Kar. 3740], a Division Bench has held that if a document is presented for registration by the executant, and in doing so, the executant complies with all the provisions of Registration Act, 1908, it is not open to the Sub-Registrar to refuse registration of the document unless, he exercises that discretion pursuant to any provision in the Act, or any other law or Rule having the force of law. The mere registration of a document is by itself not a proof of its validity, neither does it follow that the executant had title to the property, he seeks to dispose of under the document. Matters such as relating to title have to be decided before the appropriate forum. If any person is interested in contending that any particular document executed and registered under the Registration Act, 1908 is invalid or illegal for any reason whatsoever, he is certainly at liberty to question the validity of the document, the title of the executant, and such other questions before the proper forum in an appropriate proceeding.

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A.G. Shivalingappa v. A.G. Shankarappa [MANU/KA/0320/1990 : ILR 1991 Karnataka 1804], it has been held that Section 34 of the Act lays down the nature of enquiry to be held by the Sub-Registrar before registering a document. That it is quite patent that the Sub-Registrar is required to make an enquiry, whether the document has really been executed by a person who purports to execute the document, and further as to the identity of the executant or his representative who appears before him. It is well settled that the question as to the validity of the document is alien to such an enquiry. If the executant admits having executed a document, the Sub-Registrar must order registration of the document if presented in accordance with the provisions of the Act.

EARLIER REGISTERED DOCUMENT CANNOT BE CONTRADICTED BY ORAL EVIDENCE

AIR 1979 SC 1880 (SMT. KRISHNABAI GANPATRAO DESHMUKH VS. APPASAHEB TULJARAMRAO NIMBALKAR AND OTHERS) there is a bar u/S 92 of the Evidence Act to lead oral evidence contradicting the contents of the earlier registered document of partition.

ADVERSE INFERENCE AND ADMISSION

Union Of India vs Ibrahim Uddin & Anr on 17 July, 2012 , MANU/SC/0561/2012 - 2012 (8) SCC 148. Dr. B. S. CHAUHAN, J., Generally, it is the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference under Section 114(g) of the Evidence Act notwithstanding, that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. (Vide: Murugesam Pillai v. Gnana Sambandha Pandara Sannadhi, AIR 1917 PC 6; Hiralal & Ors. v. Badkulal & Ors., AIR 1953 SC 225; A.

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Raghavamma & Anr. v. A. Chenchamma & Anr., AIR 1964 SC 136; The Union of India v. Mahadeolal Prabhu Dayal, AIR 1965 SC 1755; Gopal Krishnaji Ketkar v. Mohamed Haji Latif & Ors., AIR 1968 SC 1413; M/s. Bharat Heavy Electrical Ltd. v. State of U.P. & Ors., AIR 2003 SC 3024; Musauddin Ahmed v. State of Assam, AIR 2010 SC 3813; and Khatri Hotels Pvt. Ltd. & Anr. v. Union of India & Anr., (2011) 9 SCC 126).

Mt. Bilas Kunwar v. Desraj Ranjit Singh, AIR 1915 PC 96, a view has been expressed that it is open to a litigant to refrain from producing any document that he considers irrelevant; if the other litigant is dissatisfied, it is for him to apply for interrogatories/inspections and production of documents. If he fails to do so, neither he nor the Court at his suggestion, is entitled to draw any inference as to the contents of any such documents.

In Kamma Otukunta Ram Naidu v. Chereddy Pedda Subba Reddy & Ors., AIR 2003 SC 3342, Court held that all the pros and cons must be examined before drawing an adverse inference against a party. In that case the issue had been, as to whether two persons had been travelling together in the vehicle and presumption had been drawn only on the basis that the bus tickets of both the persons were not produced. This Court held that presumption could not have been drawn if other larger evidence was shown to the contrary. (See also: Mohinder Kaur v. Kusam Anand, (2000) 4 SCC 214; and Takhaji Hiraji v. Thakore Kubersing Chamansing & Ors., AIR 2001 SC 2328).

In Municipal Corporation, Faridabad v. Siri Niwas, AIR 2004 SC 4681, Court has taken the view that the law laid down by this Court in Gopal Krishnaji Ketkar (supra) did not lay down any law, that in all situations the presumption in terms of clause (g) of Section 114 of the Evidence Act must be drawn.

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In Mahant Shri Srinivas Ramanuj Das v. Surjanarayan Das & Anr., AIR 1967 SC 256, Court held that mere withholding of documentary evidence by a party is not enough to draw adverse inference against him. The other party must ask the party in possession of such evidence to produce the same, and in case the party in possession does not produce it, adverse inference may be drawn: "It is true that the defendant-respondent also did not call upon the plaintiff-appellant to produce the documents whose existence was admitted by one or the other witness of the plaintiff and that therefore, strictly speaking, no inference adverse to the plaintiff can be drawn from his non-producing the list of documents. The Court may not be in a position to conclude from such omission that those documents would have directly established the case for the respondent. But it can take into consideration in weighing the evidence or any direct inferences from established facts that the documents might have favoured the respondent case."

In Ramrati Kuer v. Dwarika Prasad Singh & Ors., AIR 1967 SC 1134, Court held: "It is true that Dwarika Prasad Singh said that his father used to keep accounts. But no attempt was made on behalf of the appellant to ask the court to order Dwarika Prasad Singh to produce the accounts. An adverse inference could only have been drawn against the plaintiffs-respondents if the appellant had asked the court to order them to produce accounts and they had failed to produce them after admitting that Basekhi Singh used to keep accounts. But no such prayer was made to the court, and in the circumstances no adverse inference could be drawn from the non-production of accounts." (See also: Ravi Yashwant Bhoir v. District Collector, Raigad & Ors., AIR 2012 SC 1339).

In Smt. Indira Kaur & Ors. v. Shri Sheo Lal Kapoor, AIR 1988 SC 1074, the lower courts drew an adverse inference against the appellant- plaintiff on the ground that the plaintiff was not ready and willing to perform his part of the contract. The question arose as to whether the party had the means to pay. The court further held that before the adverse inference is drawn against a particular

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party, the conduct and diligence of the other party is also to be examined. Where a person deposed that as he had deposited the money in the Bank and the other party did not even ask as on what date and in which Bank the amount had been deposited and did not remain diligent enough, the question of drawing adverse inference against such a person for not producing the Pass Book etc. cannot be drawn.

In Mahendra L. Jain & Ors. v. Indore Development Authority & Ors., (2005) 1 SCC 639, Court held that mere non-production of documents would not result in adverse inference. If a document was called for in the absence of any pleadings, the same was not relevant. An adverse inference need not necessarily be drawn only because it would be lawful to do so.

In Manager, R.B.I., Bangalore v. S. Mani & Ors., AIR 2005 SC 2179, Court dealt with the issue wherein the Industrial Tribunal directed the employer to produce the attendance register in respect of the first party workmen. The explanation of the appellant was that the attendance registers being very old, could not be produced. The Tribunal, however, in its award noticed the same and drew an adverse inference against the appellants for non-production of the attendance register alone. This Court reversed the finding observing: "As noticed hereinbefore, in this case also the respondents did not adduce any evidence whatsoever. Thus, in the facts and circumstances of the case, the Tribunal erred in drawing an adverse inference.

The initial burden of proof was on the workmen to show that they had completed 240 days of service. The Tribunal did not consider the question from that angle. It held that the burden of proof was upon the appellant on the premise that they have failed to prove their plea of abandonment of service" (See also: A. Jayachandra v. Aneel Kaur, AIR 2005 SC 534; R.M. Yellatti v. Assistant Executive Engineer AIR 2006 SC 355; and Pratap Singh & Anr. v. State of M.P., AIR 2006 SC 514).

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Union Of India vs Ibrahim Uddin & Anr on 17 July, 2012 , Dr. B. S. CHAUHAN, J., Order XI CPC contains certain provisions with the object to save expense by obtaining information as to material facts and to obtain admission of any fact which he has to prove on any issue. Therefore, a party has a right to submit interrogatories relating to the same matter in issue. The expression "matter" means a question or issue in dispute in the action and not the thing about which such dispute arises. The object of introducing such provision is to secure all material documents and to put an end to protracted enquiry with respect to document/material in possession of the other party. In such a fact-situation, no adverse inference can be drawn against a party for non-production of a document unless notice is served and procedure is followed. Under Rule 14 of Order XI, the court is competent to direct any party to produce the document asked by the other party which is in his possession or power and relating to any material in question in such suit. Rule 15 Order XI provides for inspection of documents referred to in pleadings or affidavits. Rule 18 thereof, empowers the court to issue order for inspection. Rule 21 thereof provides for very stringent consequences for non-compliance with the order of discovery, as in view of the said provisions in case the party fails to comply with any order to answer interrogatories or for discovery or inspection of documents, he shall, if he is a plaintiff, be liable to have his suit dismissed for want of prosecution and if he is a defendant, to have his defence, if any, struck out and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect. Thus, in view of the above, the suit may be dismissed for non-compliance of the aforesaid orders by the plaintiff and the plaintiff shall also be precluded from bringing a fresh suit on the same cause of action. Similarly, defence of the defendant may be struck off for non-compliance of such orders.

Thus, in view of the above, the law on the issue can be summarised to the effect that, issue of drawing adverse inference is required to be decided by the court taking into consideration the pleadings of the parties and by deciding whether any document/evidence, withheld, has any relevance at all or omission of its production would directly establish the case of the other side.

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The court cannot loose sight of the fact that burden of proof is on the party which makes a factual averment. The court has to consider further as to whether the other side could file interrogatories or apply for inspection and production of the documents etc. as is required under Order XI CPC. Conduct and diligence of the other party is also of paramount importance. Presumption or adverse inference for non-production of evidence is always optional and a relevant factor to be considered in the background of facts involved in the case. Existence of some other circumstances may justify non-production of such documents on some reasonable grounds. In case one party has asked the court to direct the other side to produce the document and other side failed to comply with the court's order, the court may be justified in drawing the adverse inference. All the pros and cons must be examined before the adverse inference is drawn. Such presumption is permissible, if other larger evidence is shown to the contrary.

ADVERSE INFERENCE MAY NOT BE DRAWN WHERE THERE WAS NO OCCASION FOR THE PARTY TO ADDUCE EVIDENCE

In **Smt. Indira Kaur v. Shri Sheo Lal Kapoor AIR 1988 SC 1074** and Mohinder Kaur v. Kusam Anand (2000) 4 SCC 214, the honourable Supreme Court held that adverse inference may not be drawn where there was no occasion for the party to adduce evidence. Adverse inference can be drawn provided a party is required to lead evidence or has been directed to produce the same in view of the specific averment made by the other party and the document was in its possession.

In Kamma Otukunta Ram Naidu v. Chereddy Pedda Subba Reddy & Ors., AIR 2003 SC 3342, Court held that all the pros and cons must be examined before drawing an adverse inference against a party. In that case the issue had been, as to whether two persons had been travelling together in the vehicle and presumption had been drawn only on the basis that the bus tickets

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of both the persons were not produced. This Court held that presumption could not have been drawn if other larger evidence was shown to the contrary. (See also: Mohinder Kaur v. Kusam Anand, (2000) 4 SCC 214; and Takhaji Hiraji v. Thakore Kubersing Chamansing & Ors., AIR 2001 SC 2328).

In Mahant Shri Srinivas Ramanuj Das v. Surjanarayan Das & Anr., AIR 1967 SC 256, Court held that mere withholding of documentary evidence by a party is not enough to draw adverse inference against him. The other party must ask the party in possession of such evidence to produce the same, and in case the party in possession does not produce it, adverse inference may be drawn: "It is true that the defendant-respondent also did not call upon the plaintiff-appellant to produce the documents whose existence was admitted by one or the other witness of the plaintiff and that therefore, strictly speaking, no inference adverse to the plaintiff can be drawn from his non-producing the list of documents. The Court may not be in a position to conclude from such omission that those documents would have directly established the case for the respondent. But it can take into consideration in weighing the evidence or any direct inferences from established facts that the documents might have favoured the respondent case."

In Ramrati Kuer v. Dwarika Prasad Singh & Ors., AIR 1967 SC 1134, Court held: "It is true that Dwarika Prasad Singh said that his father used to keep accounts. But no attempt was made on behalf of the appellant to ask the court to order Dwarika Prasad Singh to produce the accounts. An adverse inference could only have been drawn against the plaintiffs-respondents if the appellant had asked the court to order them to produce accounts and they had failed to produce them after admitting that Basekhi Singh used to keep accounts. But no such prayer was made to the court, and in the circumstances no adverse inference could be drawn from the non-production of accounts." (See also: Ravi Yashwant Bhoir v. District Collector, Raigad & Ors., AIR 2012 SC 1339).

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In Smt. Indira Kaur & Ors. v. Shri Sheo Lal Kapoor, AIR 1988 SC 1074, the lower courts drew an adverse inference against the appellant- plaintiff on the ground that the plaintiff was not ready and willing to perform his part of the contract. The question arose as to whether the party had the means to pay. The court further held that before the adverse inference is drawn against a particular party, the conduct and diligence of the other party is also to be examined. Where a person deposed that as he had deposited the money in the Bank and the other party did not even ask as on what date and in which Bank the amount had been deposited and did not remain diligent enough, the question of drawing adverse inference against such a person for not producing the Pass Book etc. cannot be drawn.

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HOROSCOPE AS EVIDENCE

State of Punjab vs. Mohinder Singh: MANU/SC/0201/2005 - Horoscope is a very weak piece of material to prove age of a person. In most cases, the maker of it may not be available to prove that it was made immediately after the birth. A heavy onus lies on the person who wants to press it into service to prove its authenticity. In fact, a horoscope to be treated as evidence in terms of Section 32 Clause (5) must be proved to have been made by a person having special means of knowledge as regards authenticity of a date, time etc. mentioned therein. In that context horoscopes have been held to be inadmissible in proof of age. ..... On the contrary, the statement contained in the admission register of the school as to the age of an individual on information supplied to the school authorities by the father, guardian or a close relative is more

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authentic evidence under Section 32, Clause (5) unless it is established by unimpeachable contrary material to show that it is inherently improbable. The time of one's birth relates to the commencement of one's relationship by blood and a statement therefore of one's age made by a person having special means of knowledge, relates to the existence of such relationship as that referred to in Section 32 Clause (5). ..... Therefore, the school records have more probative value than a horoscope. Where no other material is available, the horoscope may be considered but subject to its authenticity being established.

Umesh Chandra v. State of Rajasthan MANU/SC/0125/1982 : [1982]3SCR583, ordinarily oral evidence can hardly be useful to determine the correct age of a person, and the question, therefore, would largely depend on the documents and the nature of their authenticity. Oral evidence may have utility if no documentary evidence is forthcoming. Even the horoscope cannot be reliable because it can be prepared at any time to suit the needs of a particular situation. Entries in the school register and admission form regarding date of birth constitute good proof of age. There is no legal requirement that the public or other official book should be kept only by a public officer and all that is required under Section 35 of the Evidence Act is that it should be regularly kept in discharge of official duty. In the instant case the entries in the school register were made ante litem motam.

ONCE SALE DEED EXECUTED IT CANNOT BE UNILATERALLY CANCELLED - CANCELLATION ONLY THROUGH CIVIL COURT

Manjunath Shetty vs. Bangalore Development Authority and Ors. : MANU/KA/3176/2017 - In the case of a sale deed executed and registered, the owner completely loses his right over the property and the purchaser becomes the absolute owner. Sale deed cannot be nullified by executing a deed of cancellation because by execution and registration of a sale deed, the properties are being vested in the purchaser and the title cannot be divested by mere

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execution of a deed of cancellation. ……If the sale deed is vitiated by fraud or other grounds mentioned in the Contract Act, there is no possibility of parties agreeing by mutual consent to cancel the deed. It is only the Court which can cancel the sale deed duly executed, under the circumstances mentioned in Section 31 of the Specific Relief Act, 1963. Therefore, the power to cancel a sale deed vests with a Court and it cannot be exercised by the vendor of a property. ……. Once an absolute sale deed is executed in favour of the second respondent, he becomes absolute owner in terms of the provisions of Section 54 of the Transfer of Property Act, 1882.- When the owner of property sells or conveys the property to the purchaser in written document and get the same registered, the right, title and interest in the said property is transferred from the owner to the purchaser on registration of said document. Thus, once such sale transaction takes place, the transfer is complete. The vendor of the property seized to be the owner of the property. …… Even before cancellation of the registered sale deed (document) unilaterally, when presented by the Officer of BDA, it is the duty of jurisdictional Additional District Registrar, Bangalore Urban District that before registration, he has to follow the procedure as contemplated under the provisions of Sections 32, 32A of the Registration Act, 1908 read with Rule 41 of Karnataka Registration Rules, 1965. …… Power to cancel a registered sale deed vests with the competent Civil Court and it cannot be exercised by the vendor of a property-Even by consent or agreement between the purchaser and the vendor, sale deed cannot be cancelled-Unilaterally, a vendor cannot cancel a registered sale deed by executing a deed of cancellation.

"**Satya Pal Anand v. State of Madhya Pradesh and Others**" **reported in MANU/SC/1359/2016 : (2016) 10 SCC 767** held that recall of registration/documents which were properly presented for registration, re-opening question of registration after registration cancellation or registration of documents after registration, competent authority there for is a civil court alone and none of the authorities/officers under the Registration Act, 1908 have powers in that regard.

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"**Thota Gangalaxmi and Another v. Government of Andhra Pradesh" reported in MANU/SC/1267/2010 : (2010) 15 SCC 207** in paragraph Nos. 4 and 5 held as under: "4. In our opinion, there was no need for the appellants to approach the civil court as the said cancellation deed dated 04.08.2005 as well as registration of the same was wholly void and non est and can be ignored altogether. For illustration, if A transfers a piece of land to B by a registered sale deed, then, if it is not disputed that A and the title to the land, that title passes to B on the registration of the sale deed (retrospectively) from the date of the execution of the same) and B then becomes the owner of the land. If A wants to subsequently get that sale deed cancelled, he has to file a civil suit for cancellation or else he can request B to sell the land back to A but by no stretch of imagination, can a cancellation deed be executed or registered. This is unheard of in law.

TERMS OF REGISTERED CONTRACT CANNOT BE ALTERED BY ORAL EVIDENCE

Sarvamangalamma and Ors. vs. Anusuya Bai and Ors.: MANU/KA/0386/2020 - Where any contract is required by law to be reduced in writing, then no oral evidence to the contrary would be admissible-Where under law a contract or disposition is required to be in writing and the same has been reduced to writing, its terms cannot be modified or altered or substituted by oral contract or disposition.-The oral evidence cannot exclude the written registered document by the parties.-The terms of registered document can be altered, rescinded or varied only by subsequent registered document and not otherwise. ..... Section 92 of the Indian Evidence Act excludes the evidence of oral agreement and when the original parties are not present while filing of the suit, the oral evidence of the legal heirs is not sufficient to prove the original registered sale deed to be declared as nominal. Proviso (4) to Section 92 clearly excludes the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or dispossession of the property may be proved except cases in which such contract, grant or dispossession of property by law

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is required to be in writing, or has been registered according to the law in force for the time being as to the registration of the documents. In the present case Ex. P18 is a registered sale deed registered under the Indian Registration Act, 1908. Therefore, the oral agreement is said to be set up by the parties to the sale deed as it was only a nominal sale deed cannot be said to be proved as nominal sale deed in the absence of evidence of original parties to the sale deed.

PARTITION INVOLVES NO TRANSFER OF FRESH TITLE

MANU/KA/8437/2006 : AIR 2007 KAR. 91 in the case of ARALAPPA AND ETC., VS. JAGANNATH AND ORS. Referring to this judgment, he would contend that the partition is not 'transfer' and the reason being, no conveyance is involved and in partition every one has antecedent title. Partition does not give title or create title. If the party to the partition has an antecedent title to the property, it only enables him to obtain what is his own in a definite and specific form. In a partition, no one transfers title which he possesses in favour of a person who does not possess a title. Every one has an antecedent title. Therefore, no conveyance is involved, in the process as conferment of a new title is not necessary. It does not amount to transfer.

GIFT DEED - EVIDENCE CAN BE LEAD TO SHOW IT AS TRANSFER FOR CONSIDERATION

Bai Hira Devi and Ors. vs. The Official Assignee of Bombay: MANU/SC/0001/1958 - Donees entitled to lead evidence showing gift to be transfer for consideration

FAMILY SETTLEMENT NOT REQUIRED TO BE REGISTERED

The case of **Kale & Ors. v. Deputy Director of Consolidation & Ors. [(1976)3 SCC 119]** is about family arrangement not required

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to be registered and para 10 about binding fact and essential about family settlement and certain propositions emerged therein.

ORAL AGREEMENT CONTRARY TO WRITTEN CONTRACT IS NOT AN EVIDENCE

S. Saktivel (Dead) by LRs v. M. Venugopal Pillai and others AIR 2000 S.C. 2633 in which it has been held by the Apex Court that modification by oral contract against the written document is excluded in terms of Section 92 of the Evidence Act.

Ishwar Dass Jain (Dead) Through LRs v. Sohan Lal (Dead) by LRs AIR 2000 SC 426 in which the Apex Court has held that oral evidence is admissible under Section 92 (1) of the Evidence Act to prove that the document, though executed, was not intended to be acted upon and that it was a sham document, executed only as a collateral security.

SHAM SALE DEED ALLEGATION - CONTENDING TO HAVE NOT ACTED UPON

Sadasivam v. K. Doraisamy **AIR 1996 SC 1724, JT 1996 (2) SC 400** in which the Apex Court has held that sale deed kept in the custody of the plaintiff alleging that the sale deed was sham and was not acted upon, and it was an invalid document being executed without any consideration on an understanding between the parties that it would not be acted upon, is a sham document.

The Supreme Court in Subhra Mukherjee v. Bharat Coking Coal Limited [MANU/SC/0162/2000 : 2000(3) SCC 312] observed in para 13 as under: "There can be no dispute that a person who attacks a transaction as sham, bogus and fictitious

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must prove the same. But a plain reading of question No. 1 discloses that it is in two parts; the first part says, 'whether the transaction, in question, is bona fide and genuine one, which has to be proved by the appellants. It is only when this has been done that the respondent has to dislodge it by proving that it is a sham and fictitious transaction. When circumstances of the case and the intrinsic evidence on record clearly point out that the transaction is not bona fide and genuine, it is unnecessary for the Court to find out whether the respondent has led any evidence to show that the transaction is sham, bogus or fictitious."

NEWS PAPER REPORTS AND EVIDENTIARY VALUE

Samant N.Balkrishna and another Vs.George Fernandez and other reported in 1969 (3) SCC 238 at paragraph 26, the Apex Court observed that "A newspaper item without any further proof of what had actually happened through witnesses is of no value. It is at best a second hand evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publish it. In this process truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible."

Supreme Court in Lakmi Raj Shetty and another Vs. State of Tamil Nadu reported in 1988 (3) SCC 319, opined that "...We cannot take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a newspaper is only hearsay evidence. A newspaper is not one of the documents referred to in Section 78(2) of the Evidence Act, 1872 by which an allegation of fact can be proved. The presumption of genuineness attached under

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Section 81 of the Evidence Act to a newspaper report cannot be treated as proved of the facts reported therein."

The Supreme Court dealing with a "pro bono publico" litigation in B.P.Singhal Vs.State of Tamil Nadu and others reported in 2004 (13) SCC 673, wherein the petitioner sought for a transfer of an investigation from Tamil Nadu State Police to the Central Bureau of Investigation, opined that: "the petition is lacking in material particulars. All the averments made in the petition are based, by and large, on news reports and not on personal knowledge. The petition does not state that the petitioner has taken any care to verify himself the correctness of the averments made."

Dr.B.Singh Vs. Union of India (UOI) and others reported in 2004 (3) SCC 363 dealing with a public interest litigation, challenging the propriety of the third respondent therein for being considered for appointment as a Judge, the Supreme Court while expressing its anguish found that: "the petitioner has no where stated that he has personal knowledge of the allegations made against R3. He does not even aver that he made any effort to find out whether the allegations have any basis. He only refers to the representation of Ram Sarup and some other paper cuttings of news items. It is too much to attribute authenticity or creditability to any information or fact merely because, it found publication in a newspaper or journal or magazine or any other form of communication, as though it is gospel truth. It needs no reiteration that newspaper reports per se do not constitute legally acceptable evidence."

In Quamarul Islam v. S.K.Kanta (AIR 1994 SC 1733) it was observed by the Honourable Supreme Court as follows:- "Newspaper reports by themselves are not evidence of the contents thereof. Those reports are only hearsay evidence. These have to be proved and the manner of proving a newspaper report is well settled.

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.... Newspaper, is at the best secondary evidence of its contents and is not admissible in evidence without proper proof of the contents under the Indian Evidence Act".

Court in Dev Sebastian v. P.R.Kurup (AIR 1997 Kerala 214) relied upon a number of Supreme Court judgments mentioned therein and held:- "Here since the allegations are solely based on paper reports and no evidence was placed by the petitioner in support of the reports appeared in the paper, if this Court act it will be only based on hearsay evidence and doing a constitutional injustice".

In the case of Rakesh Chand Narain v. State of Bihar, 1986 (Supp) SCC 576, the court took up the matter on the report published in the newspaper pointing sub-standards conditions existing in Ranchi Mental Hospital and the court issued directions for provisions of various amentities to the patients and for periodical visit of Chief Judicial Magistrate to the hospital and to submit report to the Court.

Apex Court in R.S.Singh v. U.P. Malaria Nirikshak Sangh [(2011) 4 SCC 281] that the Apex Court has time and again deprecated the practice of summoning senior officials of the State and Central Governments in court, except in exceptionally exceptional cases and the conduct of the State Authority in summoning the officers in the stature of the petitioner and others on a complaint of the instant nature lodged solely based on the print and visual media reports would adversely affect the decorum of their office.

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Ravinder Kumar Sharma v. State of Assam and others [(1999) 7 SCC 435], "Newspaper reports regarding the Central Government decision could not be any basis for the respondents to stop action under the Assam Control Order of 1961. The paper reports do not specifically refer to the Assam Control Order, 1961. In fact, the Government of Assam itself was not prepared to act on the newspaper reports, as stated in its wireless message. Section 81 of the Evidence Act was relied upon for the appellant, in this behalf, to say that the newspaper reports were evidence and conveyed the necessary information to one and all including respondents 2 and 3. But the presumption of genuineness attached under Section 81 to newspaper reports cannot be treated as proof of the facts stated therein. The statements of fact in newspapers are merely hearsay"

NO IMPORTANCE TO ORAL EVIDENCE TO CHANGE TERMS OF SALE DEED

THE HON'BLE MR. JUSTICE A.V.CHANDRASHEKARA of HIGH COURT OF KARNATAKA, In the case of Narayan vs Shridhar Decided on 3 April, 2014 (RSA NO.5663 OF 2010) held that "The undisputed fact is that the total extent of Sy.No.77/2 was 4 acres 20 gunta inclusive of 5 gunta kharab land. Out of the said property, plaintiff's father-in-law sold 2 acre 23 guntas in favour of the father of the defendant as per Ex.P21. 20 guntas of land already with the defendant. Therefore, the remaining extent of property measuring 1 acre 17 guntas is with the plaintiff and therefore, the plaintiff has sought the reliefs of declaration and permanent injunction. Mere adverse entry in the revenue records will not take away the right that a party has. Any amount of oral evidence sought to be adduced on behalf of the defendant to vary the terms of the sale deed with reference to the extent will not be

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of much importance and this has been taken note of by the trial Court as well as the first appellate Court."

PROCEDURE TO LEAD SECONDARY EVIDENCE

AIR 2006 KARNATAKA 95 (Gafarsab alias Sati Gafar Sab vs. Ameer Ahmad), wherein it has been held that "a party to the proceedings is not expected to file any application requesting the Court to permit him to lead the secondary evidence. All that is expected of him is to step into the witness- box and lead evidence setting out the circumstances under which he is unable to produce the primary evidence. If the Court is satisfied from such evidence that a case is made out for production of secondary evidence, it can permit the party to adduce secondary evidence subject to Sections 63 and 65 of the Act"

1998 (5) Kar.L.J.360 (G. Chikkapapanna alias G. C.Papanna vs. Smt. Kechamma (deceased) by L.Rs and Others) held that "to prove the execution, the certified copy of the documents itself is not sufficient and the same is not admissible as secondary evidence when the party producing it has not called upon opposite party to produce original and when it is not party's case that original has been lost or destroyed"

AIR 1987 ORISSA 138 (Bhaskar Sahu v. Anama Swara and others) wherein the High Court of Orissa held that "when a certified copy is allowed to be produced under Section 65, there is no presumption as to the genuiness or the execution of the original and the Court should not admit a document merely on the ground that it is certified copy of the original, unless the execution of the original is proved or admitted by the persons against whom the same is to be relied on".

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Apex Court reported in AIR 2000 SC 1759 (State of Rajasthan and others vs. Khemraj and others), it was held by the Apex Court that to invoke the provisions of Section 65 of the Evidence Act, the application for production must be filed along with the full details and it must be supported by the affidavit.

Apex Court reported in AIR 1966 SC 1457 (The Roman Catholic Mission vs. The State of Madras and another), wherein the Apex Court considering the provisions of Section 65 of the Evidence Act held that "unless the foundation is laid for establishment of right to give secondary evidence, the certified copies of original are not admissible in evidence."

WHAT IS A DEED AND ITS INTERPRETATION

Justice Hariprasad of Kerala High court in case of Sivaprasad and Ors. vs. Karthiyayani and Ors.: MANU/KE/2791/2018 - ILR 2018 (4) Kerala 671 Before referring to the evidence, certain fundamental principles regarding interpretation of deeds have to be appreciated. As per Halsbury's Laws of India, (Volume 9 - 2001 Edition, page 340) 'deed' is defined as follows: A deed is an instrument which either (1) passes an interest, right or property of itself, and creates a binding obligation on some person; or (2) amounts to an affirmation or confirmation of something which passes an interest, right or property. At common law, a deed is an instrument which complies with the following requirements:

(a) it must be written on parchment or paper;

(b) it must be executed in the manner specified below by some person or corporation named in the instrument; and

(c) as to subject matter it must express that the person or corporation so named either:

(i) makes, confirms, concurs in, or consents to some assurance or some interest in property, or of some legal, or equitable right, title, or claim; or

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(ii) undertakes, or enters into some obligation, duty or agreement enforceable at law, or in equity; or

(iii) does or concurs in some other act affecting the legal relations or position of a party to the instrument or of some other person or corporation.

Formal parts of a deed are (1) the words describing the instrument (whether conveyance, settlement, mortgage, or otherwise); (2) the date; (3) the parties' names; (4) the recitals stating the facts on which the act to be evidenced by the deed is grounded; (5) the testatum or witnessing part containing the operative words which express the parties' intention; and (6) the testimonium stating that the parties have executed the deed in witness of what is written in it.

The testatum usually contains the following subsidiary formal parts: (a) the parcels or description of the property to be conveyed; (b) the habendum[2] defining the estate or interest to be taken by the alienee; (c) the trusts, if any, imposed on the person taking the legal estate under the deed; and (d) the covenants, if any, entered into by the alienor or alienee. (See Halsbury's Laws of India, same Edition, page 344).

It is a well settled rule of interpretation of the deeds that the intention of the parties must be gathered from the written instrument read in the light of such extrinsic evidence as is admissible for the purpose of construction. The function of the Court is to ascertain what the parties meant by the words they have used. It has to declare the meaning of what is written in the instrument and not what was intended to have been written. This is basically to give effect to the intention as expressed, the expressed meaning being, for the purpose of interpretation, equivalent to the intention. (See Hind Plastics v. Collector of Customs [MANU/SC/0784 /1994 : (1994) 5 SCC 167]).

The best interpretation is made from the context. The whole context must be considered to ascertain the intention of the parties. The intention of the parties to an agreement has to be

[2] Habendum clause means the part of an instrument, such as a deed or Will, that defines the extent of the interest being granted and any conditions affecting the grant.

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gathered from the terms of the agreement construed in the context of the surroundings, antecedent and consequent circumstances. (See Puran Singh Sahni v. Sundari Bhagwandas Kripalini [MANU/SC/0541 /1991 : (1991) 2 SCC 180]; Provash Chandra Dalui v. Bishwanath Banerjee [MANU/SC/0422/1989 : AIR 1989 SC 1834].

If, however in any particular respect, the intention is clear on the whole instrument, effect will be given to that intention, even though it is not stated in express words. (See Keshav Kumar Swarup v. Flowmore Pvt. Ltd. [MANU/SC/0607/1994 : 1994 (2) SCC 10]).

A locus classicus by a Constitution Bench of the apex Court in the matter of interpretation of deeds rendered in Ramkishorelal v. Kamalnarayan [MANU/SC/0022/1962 : AIR 1963 SC 890] is to be mentioned in this context. The general principle regarding interpretation has been stated thus: The golden rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has to a trained conveyancer a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyancing.

After surveying all the binding precedents, Court in **Indira Motor Service Thana & Others v. Panakkat Nazaruddin & Others [MANU/KE/1759/2015 : 2015 (4) KLJ 357]** has laid down the following principles:

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12. First and foremost principle is that whenever a document is couched in a language which is clear and definite and no doubt arises in its application to the facts, there is no need to resort to the rules of interpretation. Rules of interpretation of deeds are intended to ascertain, to the extent possible, the exact meaning of a document which is not clear and definite. Many a time, language proved to be an imperfect vehicle for expressing thought and intention. The rules of interpretation or canons of constructions are the products of real life experiences of Judges and Jurists. Prime purpose of interpretation of a document is to ascertain the intention of the parties manifested at the time when the document was executed. To ascertain the intention of the parties, the document must be considered as a whole. It is from the whole of the document, coupled with the surrounding circumstances, that the general intention of the party or parties is to be ascertained. Attempt must be made to gather the intention of the parties from the exact words used in the deed. When the words used in a deed are in their literal meaning unambiguous and when such meaning is not excluded from the context and is sensible with respect to the parties at the time of executing the deed, such literal meaning must be taken. Where, the words used in a deed, if taken in its literal sense lead to absurdity and inconsistency, then an interpretation to avoid that absurdity and inconsistency should be made. It is also a settled principle that when the intention of the maker or makers of a deed cannot be given effect to in its full extent, effect is to be given to it as far as possible. Where the intentions are sufficiently clear from the deed itself, mis-recital in some part of the deed cannot vitiate it. Anything expressly mentioned in the deed excludes another view impliedly possible.

13. As far as possible, effect is to be given to all words used in a document. This is yet another important principle in the interpretation of deeds. A document should be construed in its entirety. Further, if possible, it should be construed so as to give effect to every word employed therein. The court is not at liberty to discard a word, if some meaning can be ascribed to it. Normally, the words employed in a deed should be taken in its ordinary sense, unless there are indications to do otherwise. It is also an important rule that plain words should be given plain meaning.

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In Devasironmani and another v. T. Rajathangam and another [MANU/TN/1142/1997 : 1998 (1) MLJ 322] it was held in paragraph 16: "For interpreting a document, we have to interpret the document on the words used and not by the subsequent conduct. If the parties are not getting any title, to the property on the basis of the document, a mere subsequent statement that they have obtained title on the basis of the earlier document will not create interest in them." Reliance was placed on the passages from Odgers' "Construction of Deeds and Statutes". It was further held that surrounding circumstances may be considered for the purpose of ascertaining the intended meaning of those words, specially when there is some ambiguity in the words, used in the document. It was further held therein that if a document does not create a right 'in praesenti', the claimant could claim his right as if the said document is a Will.

In A. Sreenivasa Pai and Anr. v. Saraswathi Ammal alias G. Kamala Bai MANU/SC/0263/1985 : AIR 1985 SC 1359 , their Lordships held that 'In construing a document, whether in English or in any Indian language the fundamental rule to be adopted is to ascertain the intention from the words employed in it. The surrounding circumstances may be considered for the purpose of ascertaining the intended meaning of those words, specially when there is some ambiguity in the words used in the document".

Supreme Court reported in **Gomtibai v. Mattulal MANU/SC/0052/1997 : [1996] 1 SCR 839** , the case was regarding partition deed between two brothers. A recital was made that they intended to gift the land to their cousin sister Kasturibai, and a subsequent correspondence also shows that the land was allotted to Kasturibai. The question before the Supreme Court was, whether the earlier intention to execute a gift and the subsequent correspondence will amount to a gift. That was a document which came into, existence at a time when the Transfer of Property Act was not in force in the State of Hyderabad. But there was a similar provision under the Hyderabad Transfer of Property Act.

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Considering the same, in paragraph 4 of the judgment, their Lordships said thus: ... it is seen that the gift of immovable property should be made only for transferring the right, title and Interest by the donor to the donee by a registered instrument signed by or an behalf of the donor and must be attested by atleast two witnesses. The preexisting right, title and interest of donor thereby stand divested in the donee by operation of Section 17 of the Registration Act only when the gift deed is duly registered and thereafter the donor would lose title to the property. It must also be proved that the donee had accepted the property gifted over under the instrument. In this case, though the transfer or gift was acted upon by Kasturibai as per the correspondence and evidence on record, but, admittedly, there is no written instrument executed by the donor, namely, the plaintiff and the defendant in favour of their cousin sister Kasturibai and it was got attested by atleast two witnesses and registered in accordance with the provisions of the Stamp Act and the Registration Act.

Their Lordships were of the view that unless the property is legally transferred in favour of their cousin, here cannot be any question of gift though there may be a valid intention to gift.

Abdulla Ahmed v. Animendra Kissen Mitter [MANU/SC/0013/1950 : AIR 1950 SC 15] rendered by the Constitution Bench, wherein it was held in paragraph 23 as follows: "The subsequent conduct of both the parties to the agreement very strongly supports this view. The evidence of such conduct is relevant in this case because, as pointed out by Viscount Simon, L.C., in the case already referred to, the phrase "finding a purchaser" is itself not without ambiguity. Here the phrase is "securing a purchaser ". This phrase similarly is not without ambiguity. The evidence of conduct of the parties in this situation as to how they understood the words to mean can be considered in determining the true effect of the contract made between the parties. Extrinsic evidence to determine the effect of an instrument is permissible where there remains a doubt as to its true meaning. Evidence of the acts done under it is a guide to the intention of the parties in such a case and particularly when acts are done shortly after the date of the instrument.

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M.N. Aryamurthy and another v. M.D. Subbaraya Setty [MANU/SC/0479/1971 : AIR 1972 SC 1279] rendered by a three Judge Bench, has argued that Ext. A1 cannot be considered as a family settlement. It was held in paragraph 10 of the decision noted supra, that: "As pointed out in Halsbury's Laws of England, 3rd Edition, Vol. 17, at p. 215: A family arrangement is an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour." The aforesaid view in relation to family settlement had been originally formed by the Apex Court in Maturi Pullaiah and another v. Maturi Narasimham and others [MANU/SC/0328/1966 : AIR 1966 SC 1836]. ..... "It will be, therefore, seen that, in the first place, there must be an agreement amongst the various members of the family intended to be generally and reasonably for the benefit of the family. Secondly, the agreement should be with the object either of compromising doubtful or disputed rights, or for preserving the family property, or the peace and security of the family by avoiding litigation, or for saving its honour. Thirdly, being an agreement, there is consideration for the same, the consideration being the expectation that such an agreement or settlement will result in establishing or ensuring amity and good-will amongst the relations."

In K.H. Krishna Iyer and others v. Parvathy Ammal and others [MANU/KE/0378/1988 : 1988 (2) KLJ 156], Court had occasion to consider the parameters, which can bring a document in the category of a family arrangement. In order to bring out a document within the scope of family arrangement, it was held that - "..... the essential requirements are (1) there must be agreement among the various members intended generally and reasonably for the benefit of the family, (2) the agreement must be with the object of compromising doubtful or disputed claims or rights for preserving the family property or for purchasing peace and security of the family by avoiding litigation or saving its honour and (3) there is

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consideration which could be the expectation that the arrangement will result in establishing or ensuring amity or goodwill among the relations. It must be an arrangement that comes into existence in presente."

In Rajammal alias Sundarammal and others **[MANU/PR/0023/1944 : AIR 1945 PC 82],** it was held:- "It is settled that mere attestation is not enough to involve the witnesses with knowledge of the contents of the deed, and this is equally true of the witnesses who identify the executant before the Registrar."

In Torabaz Khan and another v. Nanak Chand and another [MANU/LA/0154/1932 : AIR 1932 Lahore 566], it was held:- "It is true that, merely by signing a document as an attesting witness, a person cannot be said to have knowledge of its contents, but there may be circumstances when he would be deemed to have notice of the contents of the document which he is attesting and signing as a witness."

State of Kerala v. M.A. Babu and another **[MANU/KE/0165/2003 : 2003 (2) KLJ 299],** wherein it was held:- "But then one cannot be unmindful of the realities of everyday life that when the son functions as attestor to a document executed by his own old, sick and infirm father, the son may be playing a major role in the matter of arranging for the sale identifying the purchaser and even negotiating as to what should be the consideration for the sale. Attestor to a document cannot by mere attestation be imputed with the knowledge of the contents of the document. However, on the facts of a given case where there is a close relationship between the executant and the attestor such as husband and wife, father and son, the possibilities of the attestor having knowledge regarding the recitals in the documents and about the circumstances under which the document came to be executed cannot be ruled out. Under the order of clarification I permitted the petitioner to examine the son of the executant, an attestor to the document as a substitute for his father only because of the

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submission that the son is competent to speak about the circumstances under which the document was executed."

UNREGISTERED DOCUMENT HOW FAR ADMISSIBLE FOR COLLATERAL PURPOSES

Hon'ble Supreme Court, had an occasion to discuss about the law relating to admissibility of unregistered document for collateral fact/collateral purpose in the case of **K.B. SAHA AND SONS PRIVATE LIMITED v. DEVELOPMENT CONSULTANT LIMITED** reported in **MANU/SC/7679/2008 : (2008) 8 SCC 564**. At paragraph 34 of the judgment, it is held as under:

"From the principles laid down in the various decisions of this Court and the High Courts, as referred to hereinabove, it is evident that:-

1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the Proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immoveable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

WHEN DOCUMENT IS SPECIFICALLY DENIED HOW TO PROVE IT

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Vijayashekar vs. Gururaj D. Vadavi and Ors.: MANU/KA/3982/2020 - It is also pertinent to mention here that, the plaintiff has not proved the disputed loan agreement (EX. P7) by examining the scribe or the witnesses to the loan agreement (Ex. P7). Except the evidence of PW-2 (husband of plaintiff), no independent witnesses were examined by the plaintiff despite the defendant No. 4 disputed the same at Para 5 of the written statement.

SEVERAL MODES TO PROVE A DOCUMENT

Gwalior Bench in the matter of L.S. Trading Company Vs. Manish Mishra reported in MANU/MP /0057/2010 : 2010 (4) MPLJ 228 by observing as under:-

"(5.) There are several modes to get a document proved. While examining the scope of section 67 of the Evidence Act we find that there cannot be any straight jacket formula or any particular mode of proving a particular document or handwriting or signature. Section 67 of the Evidence Act is the relevant provision in respect to the proof of signature and handwriting of a person. According to us, following are the modes for proving a document:-

"(i) By calling a person who signed or wrote a document;

(ii) By calling a person in whose presence the documents are signed or written;

(iii) By calling handwriting expert;

(iv) By calling a person acquainted with the handwriting of the person by whom the document is supposed to be signed or written;

(v) By comparing in Court, the disputed signatures of handwriting with some admitted signatures or writing;

(vi) By proof of an admission by the person who is alleged to have signed or written the document that he signed or wrote it;

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(vii) By the statement of a deceased professional scribe, made in the ordinary course of business, that the signature on the document is that of a particular person; A signature is also proved to have been made, if it is shown to have been made at the request of a person by some other person, e.g. by the scribe who signed on behalf of the executant;

(viii) By other circumstantial evidence."

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CHAPTER-6

GPA AND NOTARY

GPA AND ITS REVOCATION

MANU/KA/3784/2013 : I.L.R. 2014 KAR 4185 in the case of S.V. NARAYANASWAMY VS. SMT. SAVITHRAMMA, Power of Attorney coupled with interest - All the rights and liabilities under the contract were made over to the Attorney - Oral agreement of sale executed by the vendor - Delivery of possession of property to the buyer in part performance of agreement to sell - Subsequent irrevocable GPA executed by the vendor in favour of purchaser assigning various rights including to put up construction - Clause relating to irrevocable is introduced in the Power of Attorney - Held, Such Power of Attorney is termed as the Power of Attorney coupled with interest and is regarded as property disposition/transfer of property rather than as the conferring of general authorities on the attorney. - Further Held, It is clear from the terms of GPA, the appellant has been authorised to put up construction, to obtain license, to pay tax, to apply for necessary permits, to get cement, steel etc., to enter into an agreement or agreements to lease out, to realise rent, to manage, supervise and direct construction, to pay after construction house tax, light and water charges, to attend repairs or alteration, and to defend all actions. Clause No. 15 of the GPA provides that the executant i.e., 'X' shall not revoke the GPA until such time that his attorney voluntarily seeks for such revocation. It is clear that, the GPA cannot be revoked until such time the appellant seeks for its revocation. Therefore, it cannot be said that the GPA was given only for the purpose of putting up construction. The GPA authorises the appellant to enter into agreement, to lease out the property, to attend to repairs and alteration, to pay tax and other charges after construction. The GPA cannot be revoked until such time the appellant voluntarily seeks for its revocation. Therefore, the contention of the respondents that the GPA was given only for the purpose of construction cannot be accepted.

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GPA EXECUTED BEFORE NOTARY IS IN-VALID FOR EXECUTING SALE DEED – GPA EXECUTED AND AUTHENTICATED BEFORE REGISTRAR OR SUB-REGISTRAR IS ONLY VALID

That Section 32 of the Registration act makes it imperative that every document to be registered shall be presented at the proper registration office by some person executing or claiming under the same or by the representative or assign of such person, agent, representative or assign duly authorised by power-of-attorney executed and authenticated in the manner provided by Section 33. In case a document is presented for registration by a person other than a party to it or his legal representative or assign or by a person who is not an agent authorised in the manner prescribed under Section 33 such presentation is wholly imperative and presentation of such a document is void. That the object of Sections 32 to 35 Is to avoid commission of frauds by means of registration under the Act by a person not duly authorised and it is the duty of the Court In India not to allow the imperative provisions of the Act to be defeated when it is proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed by the Act to be presented. A Registrar has no jurisdiction to register a document unless he is moved to do so by a person who has executed it, or claims under it. or by the representative of such a person. That the object of the Legislature in enacting Section 32 is to prevent a mere outsider from presenting for registration a document with which he has no concern, and in which he has no interest. To allow all and sundry to present documents for registration would be to open a door to fraud and forgery and the Legislature, therefore. Intended to provide that the registration should be initiated by the document being presented for registration by a person "having a direct relation to the deed". If the presentation for registration was ab initio defective, in that it did not conform to the requirements of the provisions of the Indian Registration Act in that regard, then, such initial defect in presentation for registration affected the

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jurisdiction of the registering officer' to effect the registration of the document.

Further technical objection may be taken to such power of attorney. The Section 28 of the Registration Act, as is relevant in the context, provides that a document affecting immovable property shall be presented for registration in the office of a sub-registrar within whose sub-district the whole or some portion of the property to which such document relates is situate.

Case laws on the point

Justice Pratibha Bonnerjea, of Calcutta High Court in the case of **Goswami Malti Vahuji Maharaj vs Purushottam Lal Poddar AIR 1984 Cal 297 Quotes following case laws:-** In AIR 1928 Pat 304 (Elizabeth" May Toomey v. Bhupendra Nath Bose) a document was executed and registered under Sections 32 and 33 of the Registration Act on the strength of a Power of attorney which was challenged as invalid inter alia on the ground that in the Registrar's certificate on the document, the concerned power-of-attorney was described as a general power of attorney. It was contended that it did not authorise the agent Mr. Kennedy to admit execution or to present the same for registration. It was held at page 313:-- "The document purports to have been properly registered in accordance with the provisions of Sections 32 and 33, Registration Act. It was the duty of the Sub-Registrar to satisfy himself that the power-of-attorney gave Mr. Kennedy the necessary authority and it must he assumed until contrary is proved that he so satisfied himself' before he admitted the document for registration and signed the endorsement. I am certainly not prepared to find merely because the power-of- attorney is described as a general power in the Sub-Registrar's endorsement that it did not authorise Mr. Kennedy to admit execution or present the document for registration."

Justice Prabir Kumar Samanta, of **Calcutta High Court in the case of Dulal Ranjan Ghosh Dastidar vs Rajani Tandon And Anr. 2004 (1) CHN 517 held "**Section 32 of the said Act primarily

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stipulates that every document to be registered shall be presented at the proper Registration Office by some person executing the same. Section 33(1)(a) of the said Act provides that for the purpose of Section 32 i.e., for the purpose of presentation of a document for registration, only such Power of Attorney shall be recognised for such presentation which has been executed by the principal before and authenticated by the Registrar or Sub-Registrar within whose District or Sub-District the principal resides. Thus upon conjoint reading of Section 32 and Section 33(1)(a) of the said Act it appears that while Section 32 empowers the executants of a document to present the same for registration without any reservation, but requires the Power of Attorney to be executed before and authenticated by the Registrar or Sub-Registrar within whose District or Sub-District the principal resides for valid presentation for registration by the constituted attorney on behalf of the principal. ..... These two clauses read together make it clear that the agent, representative or assignee of the principal whether authorised or not to execute the document on behalf of the principal will be entitled to validly present the documents for registration only when such agent, representative or assignee has been duly authorised by Power of Attorney executed and authenticated in the manner provided under Section 33(1)(a). If that position is accepted, and it has to be accepted as such in view of the provisions contained therein, can it be said that only for the purpose of presentation of document for registration which has been executed by the principal himself such requirements would be necessary but for the purpose of execution of the document on behalf of the principal such requirements would not be necessary? Such interpretation would make the said provisions otiose, because by a Power of Attorney which is neither executed nor authenticated in the manner as provided under Section 33(1)(a) of said Act, an agent, representative or assignee of the principal who will not be entitled to validly present a document for registration would then be entitled not only to present for registration but also to execute the same on behalf of the principal. In other words each Clauses of Section 32 has its independent application and meaning and one has not the effect of substituted application over the other. Therefore, Section 32 read as a whole along with Section 33(1)(a) of the said Act would imply that whenever by a Power of

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Attorney a principal authorises his agent, representative or assignee to execute a document on his behalf, such Power of Attorney would be required to be authenticated in the manner provided under Section 33(1)(a) of the said Act."

The following privy council case laws are quoted on the point By Justice Ratnam of Madras High Court Judgement in the case of **Sekar Mudaliar And Etc vs Shajathi Bi And Anr. Reported in AIR 1987 Mad 239,**

Mujibunnissa v. Abdul Rahim (1901) I.L.R. 23 A11. 233 (P.C.) : 288415 the Privy Council pointed out that the principle in that decision would apply to that case as well and that the principle is that a Registrar or a Sub Registrar has no jurisdiction to register a document, unless he is moved to do so by a person who has executed or claims under it or by the representative or assign duly authorised by a power of attorney executed and authenticated in manner prescribed in Section 33 of that Act. It was also further pointed out that the executants of a deed attending the Registrar or a Sub Registrar merely for the purpose of admitting the execution, cannot be treated for the purposes of Section 32 of Act III of 1877, as presenting the deed for registration and their assent to the registration will not be sufficient to give the Registrar jurisdiction. The object of Sections 32, 33, 34 and 35 of Act III of 1877 was pointed out to be to make it difficult for persons to commit frauds by means of registration under the Act. The Privy Council further pointed out the duty of the courts in this connection and stated that Courts ought not to allow the imperative provisions of the Act to be defeated when as in that case, it was proved that an agent who presented a document for registration had not been duly authorised in a manner prescribed by the Act to present it.

In Dottie Karan v. Lachmi Prasad A.I.R. 1931 P.C. 52 : 33 L.W. 566 : 589 A 58 : 60 M.L.J. 441, the validity for presentation of a document for regulation by a power of attorney agent, the power

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in whose favour contained an alteration in the date, came to be considered. The Privy Council pointed out that the date in the power of attorney was altered and the registration of the mortgage was not effected in accordance with the provisions of the Registration Act and that the deed was not properly registered, not being presented for registration by an authorised agent. It was also further laid down that such a defect was not one merely of procedure, but one of jurisdiction in the registering officer.

In a Single Bench decision of the Andhra Pradesh High Court reported in AIR 1958 Andh Pra 107, D. Sardar Singh v. Pissumal H. Bankers, it was held that where a person holding a power-of-attorney executes a sale-deed he cannot present it for registration unless he holds a power-or-attorney satisfying the requirements of Section 33.

In AIR 1927 Bom 487 (FB), Sitaram v. Dharma-sukhram, held that a person executing a document on behalf of himself and another under a power-of-attorney from the latter, which power does not comply with Section 33 or the Indian Registration Act is competent to appear before the Registrar to admit the execution of that document.

NOTARISED GPA WHERE ITS IS ACCEPTED

Jugraj Singh & Anr vs Jaswant Singh & Ors 1971 AIR 761, 1971 SCR (1) 38 The first power of attorney was not authenticated as required by s; 33 of the Indian Registration Act which in the case of an Indian residing abroad, requires that the document should be authenticated by a Notary Public. The document only bore the signature of a witness without anythingto show that he was a Notary Public. In any event there was no authentication by the Notary Public (if he was one) in the manner which the law would consider adequate. The second power of attorney however did show that it was executed before a proper Notary Public who

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complied with the laws of California and authenticated the document as required by that law, and was also duly authenticated in accordance with our laws. The only complaint was that the Notary Public did not say in his endorsement that V had been identified to his satisfaction. But that flows from the fact that he endorsed on the document that it had been subscribed and sworn before him. There is a presumption of regularity of official acts and he must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. This made the second power of attorney valid and effective both under s. 85 of the Indian Evidence Act and s. 33 of the Indian Registration Act.

BHATORI VS RAM PIARI 1996 AIR 2754 = 1996 (4) Suppl. SCR 180 = 1996 (11) SCC 655 = 1996 (7) JT 210 = 1996 (5) SCALE 752 POWER OF ATTORNEY HOLDER ALIENATING THE LANDS IN THE NAME OF HIS WIFE DEFRAUDING THE LAND OWNER – FRAUD UNRAVELS EVERYTHING 1996 SC

NOTARIES ARE ABSOLUTELY MISUSING THE LICENCE GRANTED TO THEM

In (Dy. General Manager, Re-designated As Dy.Director, Isb Etc., v. Sudarshan Kumari and Ors., .), **1996 AIR 1894, 1996 SCC (3) 763** the Supreme Court has noticed Section 8 of the Notaries Act. After noticing, the Supreme Court has ruled as under: "We have seen original rejoinder affidavit filed in this Court. They have approached one Notary who had initially attested it and later he had cancelled it without even verifying- the valid ground on which the earlier attestation came to be cancelled, same was again attestation came to be cancelled, same was again attested by one Sundersham Kumar on November 1, 1994. In view of the admitted position that she herself had not signed and asked someone who had signed it, it would be obvious that the person who had signed before him was not the respondent nor even the person was known to the Notary. None identified her before the Notary, yet he attested the affidavit. This would show that some Notaries are absolutely misusing the licence granted to them without any proper

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verification of the persons who has signed the document and are attesting false affidavits of impersonators."

COMPETENCY OF GPA HOLDER AS A WITNESS

In Vashdeo Bjhojwani AIR 2005 SCC 217, the Apex Court held as follows: "12 ..... The power of attorney holder does not have personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal."

In Shambhu Dutt Shastri 1986 (2) WLN 713, the Rajasthan High Court held as follows: "A general power of attorney holder can appear, plead and act on behalf of the party, but he becomes a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness-box on behalf of himself. To appear in a witness-box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff."

In Indira Devi MANU/AP/0393/2003 : 2003 (4) ALD 302 (DB), the Division Bench of AP High Court, ruled as follows:

"16. Therefore, the requirement is that when GPA-holder is representing the party, the Judge is required to record in writing that he is permitted to appear and act on behalf of the party. In the instant case, the procedure prescribed under Rule 32 of Civil Rules of Practice has been followed. The case dealt with by the learned Single Judge of Rajasthan High Court was on a different footing. Apart from that, thus when once a person files a suit on behalf of the party, as a GPA holder he enters into the shoes of that party and except to the extent of personal knowledge, he is entitled

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to depose on other facts. In the instant case, what was relied upon by the plaintiffs is entirely documentary evidence, which are public documents and no personal knowledge was required to be pressed into service to establish the case of Plaintiff."

KNOW MORE ABOUT NOTARY BEFORE SEEKING/DOING HIS WORK

In Prataprai Trumbaklal Mehta v. Jayant Nemchand Shah and Anr., , **AIR 1992 Bom 149,** the Bombay High Court has considered once again Section 8 of the Notaries Act, This is what the Bombay High Court says: "A notary has to make entry in the notarial register in respect of the notarial act of certifying copy of document as true copy of the original. Even if one or two columns of the said form is not applicable, entries must be made in the said register filling up remaining columns as are applicable and adapting the format accordingly. He has to place his signature and seal on the copy of the document and keep the copy on his record. It is the responsibility of a notary to satisfy himself that the original document intended to be executed before him was executed by the person concerned and not by someone else in the name of a different person i.e, about the identity of the executant of the original document by making all reasonable inquiries including insistence of identification of a member of the public by a legal practitioner known to the notary. Unless the executant is known to the notary personally, the notary must insist on written identification of the executant by an advocate and take signatures of both of them in token thereof in the notarial register in order to minimise the possibility of cheating by personification. Negligence of a notary in the discharge of his notarial functions may jeopardise the interest of third parties and public interest itself. Notaries enjoy high status throughout the country and the Courts take judicial notice of the seal of the notary and presume that the document in question must have been certified as true copy after taking of all possible care by the notary in comparing the copy with its original and due verification of the identity of the executant and the person appearing before the notary for the certification."

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On 9th August 1952, the President of India granted assent to the Notaries Act, 1952 passed by our Parliament. The said Act came into force on 14th December 1956 on issue of necessary notification and publication thereof in the Government Gazette. Prior to the passing of the said Act, the Government of India was empowered to appoint Notary-Public under Sections 138 and 139 of the Negotiable Instruments Act for the limited purpose of functioning of Notaries under the said Act. Prior to the passing of the said Act, the Master of Faculties in England also used to appoint Notaries Public in India for performing all notarial functions. Section 3 of the said Act empowers the Central Government to appoint any legal practitioner or any other person as a notary for the whole of India or part thereof. The said Section also empowers the State Government to appoint any legal practitioner or other person who possess prescribed qualifications as a notary for functioning as such within the State. The notarial functions include "certifying copies of documents" as true copies of the original. Section 15 of the Notaries Act, 1952 empowers the Central Government to make rules to carry out the purposes of the Act including prescribing of fees payable to a notary for doing any notarial act and prescribing of form of registers required to be maintained by a notary, and particulars to be entered therein. In exercise of the powers conferred by Section 15 of the Notaries Act, 1952, the Central Government has framed the necessary rules. Rule 10(1) of the Notaries Rules, 1956 prescribes that every notary shall charge a fees for certifying copies of documents as true copies of the original at the rate prescribed therein. Rule 11(9) of the said Rules provides that every notary shall grant a receipt for the fees and charges realised by him and maintain a register showing all the fees and charges realised for every single notarial act. Rule 12 of the said Rules prescribes for use of seal of notary. Rule 11(2) of the said Rules in terms provides that every notary shall maintain notarial register in prescribed Form No. 15. The prescribed form of the register provides for entry of every notarial act in the notarial register and taking of signature of the person concerned in the register and entry in respect of fees charged. ..... Even if one or two column of the said form is not applicable, entries must be made in the said register filling up remaining columns as are applicable and adapting the format accordingly. It is the

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responsibility of a notary to satisfy himself that the original document intended to be executed before him was executed by the person concerned and not by someone else in the name of a different person. It is the responsibility of the notary to satisfy himself about the identity of the execution of the original document by making all reasonable inquiries including insistence of identification of a member of the public by a legal practitioner known to the notary. Unless the executant is known to the notary personally, the notary must insist on written identification of the executant by an advocate in order to minimise the possibility of cheating by personification. Negligence of a notary in the discharge of his notarial functions may jeopardise the interest of third parties and public interest itself. If the work of comparison of copy of the document with the original and the prima facie scrutiny of authenticating the original involves labour for too little a fee, the person concerned need not opt to become a notary. Notaries, formerly known as Notary-Public, enjoy high status throughout the couniry and the Courts take judicial notice of the seal of the notary and presume that the document in question must have been certified as true copy by the notary after taking of all possible care by the notary in comparing the copy with its original and due verification of the identity of the executant and the person appearing before the notary for the certification.

EVIDENCE OF ATTORNEY HOLDER

Man Kaur [Dead] By LRS. Vs. Hartar Singh Sangha [MANU/SC/0789/2010 : (2010) 10 SCC 512], the Hon'ble Apex Court has enunciated the legal position as under:

"(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or

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transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and

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willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

Where a party to the suit does not appear in the witness-box and state his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct.

If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross examination on that issue. A plaintiff cannot obviously examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned."

POWER OF ATTORNEY HOLDER CANNOT DEPOSE FOR THE PRINCIPAL FOR THE ACTS DONE BY THE PRINCIPAL

Apex Court in **Janki Vashdeo Bhojwani and Anr. v. Indusind Bank Ltd and Ors. 2005 SAR (Civil) 103, 2004 AIR SCW 7064**, wherein it is held that power of attorney holder - can appear, apply and act in any court on behalf of principal but such act cannot be extended to depose in the witness box in place of principal - if the power of attorney holder has rendered some acts in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him - he cannot depose for the principal in respect of the matter which only the principal can have personal

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knowledge and in respect of which the principal is entitled to be cross examined.

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CHAPTER-7

FRAUD AND FORGERY

HOW FRAUD IS TO BE PROVED

The law is well settled in so far as the nature of evidence to be tendered and the manner in which the burden of proof would have to be discharged in civil cases, where allegations of fraud are made. A Note on

The 'Evidence and Burden of Proof' in the Indian Contract Act, 1872, 14th edition, by Pollock and Mulla, reads thus:[3]

"Evidence and Burden of Proof in a great majority of cases, fraud is not capable of being established by positive and tangible proof. It is by its very nature secret in its movements. It is, therefore, sufficient if the evidence given is such as may lead to an inference that fraud must have been committed. In most cases circumstantial evidence is the only resource in dealing with questions of fraud.[4] If this were not allowed, the ends of justice would be constantly, if not invariably, defeated.[5]

At the same time the inference of fraud is to be drawn only from positive materials on record and cannot be based on speculation and surmises;[6] however suspicious the circumstances, however strange the coincidences and however grave the doubts, they alone cannot take place of proof of fraud. The evidence of fraud must be sufficient to overcome the natural presumption of honesty and fair dealing; it is not to be presumed

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[3] Patel Ramanbhai Mathurbhai vs. Govindbhai Chhotabhai Patel and Ors.: MANU/GJ/0774/2018

[4] (Rakhal Chandra Bardhan v. Prosad Chandra Chatterjee, MANU/WB/0246/1925 : AIR 1926 Cal 73 at 77; Umrao Begum v. Sheikh Rahmat Ilahi, MANU/LA/0019/1939 : AIR 1939 Lah 439 at 36, 451; Bhabhutmal Nathmal v. Khan Mohammad, MANU/NA/0236/1945 : AIR 1946 Nag 419 at 423; Passarilal Mannoolal v. Chhuttanbai, MANU/MP/0157/1958 : AIR 1958 MP 417 at 422)

[5] (Pandit Parkash Narain V. Raja Birendra Bikram Singh, MANU/OU/0036/1931 : AIR 1931 Oudh 333; Thangachi Nachial v. Ahmed Hussain Malumiar, MANU/TN/0126/1957 : AIR 1957 Mad 194 at 197; (1957) 1 Mad LJ 300)

[6] (Arabinda Barma v. Chandra Kanta, MANU/GH/0144/1953 : AIR 1954 Assam 94; Passarilal Mannoolal v. Chhuttanbai, MANU/MP/0157/1958 : AIR 1958 MP 417 at 422)

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or inferred lightly.[7] Evidence of unfairness in the transaction may be considered, but not when direct evidence on the question of fraud is unreliable.[8] The solitary testimony of the plaintiff would not suffice.[9] Pleas of fraud must be examined by the Court with utmost rigour.[10] The burden of proving fraud lies on the person alleging it.

The charge of fraud, though in a civil proceeding, must be established beyond reasonable doubt.[11] In any case, the level of proof required is extremely high and is rated on par with a criminal trial.[12] (heavy burden to show fraud).

The burden of proof is not a light one. On another view, although the burden of proof is the same as in other civil proceedings,[13] namely, proof on the balance of probabilities, yet it is not easily discharged in practice. (Chitty on Contracts, 28th edn, p. 361, para 6-045.) To prove fraud, it must be proved that the representations made were false to the knowledge of the party making them, or were such, that the party could have no reasonable belief that they were true; that they were made for the purpose of being acted upon and that they were believed and acted upon and caused the actual damage alleged.[14] He can succeed only upon proof of fraud as alleged by him."

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[7] (Rakhal Chandra Bardhan v. prosad Chandra Chatterjee, MANU/WB/0246/1925 : AIR 1926 Cal 73 at 77; Govinda Naik Gurunath Naik v. Gururao Puttanbhat Kadekar, MANU/KA/0129/1971 : AIR 1971 Mys 330 at 331)

[8] (Harihar Prasad Singh v. Narsingh Prasad Singh, MANU/BH/0123/1940 : AIR 1941 Pat 83 at 90)

[9] (Hajra Bai v. Jadavbai, MANU/MP/0024/1986 : AIR 1986 MP 106)

[10] (Firm of Sodawaterwala v. Volkart Brothers, AIR 1923 Sind 25 at 28)

[11] (ALN Narayanan Chettyar v. Official Assignee High Court Rangoon, MANU/PR/0009/1941 : AIR 1941 PC 93; followed in Union of India v. Chaturbhai M Patel and Co., MANU/SC/0046/1975 : (1976) 1 SCC 747, AIR 1976 SC 712)

[12] (Savithramma v. H Gurappa Reddy, MANU/KA/0025/1996 : AIR 1996 Kant 99 at 104; Ranganayakamma v. K.S. Prakash, MANU/SC/7734/2008 : AIR 2009 SC, (Supp) 1218, (2008) 15 SCC 673; Alva Aluminum Ltd. v. Gabriel India Ltd., MANU/SC/0951/2010 : (2011) 38 1 SCC 167,

[13] (Hornal v. Neuberger Products Ltd., [1957] 1 QB 247, [1956] 3 All ER 970)

[14] (Gauri Shankar v. Manki Kunwar, MANU/UP/0713/1923 : 45 All 624, AIR 1924 All 17 at 19; People's Insurance Co. Ltd. V. Sardur Sardul Singh Caveeshar, MANU/PH/0093/1962 : AIR 1962 Punj 543)

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FRAUDULENT MISREPRESENTATION AS TO THE CHARACTER OF THE DOCUMENT

Smt. Dularia Devi vs Janardan Singh & Ors 1990 AIR 1173, 1990 SCR (1) 799 In the instant case, the plaintiff-appellant was totally ignorant of the mischief played upon her. She hon- estly believed that the instrument which she executed and got registered was a gift deed in favour of her daughter. She believed that the thumb impressions taken from her were in respect of that single document. She did not know that she had executed two documents, one of which alone was the gift deed, but the other was a sale of the property in favour of the defendants. This was, therefore, a case of fraudulent misrepresentation as to the character of the document executed by her and not merely as to its contents or as to its legal effect. The plaintiff-appellant never intended to sign what she did sign. She never intended to enter into the contract to which she unknowingly became a party. Her mind did not accompany her thumb impressions. It was thus a totally void transaction.

In Ningawwa v. Byrappa, **1968 AIR 956, 1968 SCR (2) 797,** Court referred to the well established principle that a contract or other transaction induced or tendered by fraud is not void, but only voidable at the option of the party defrauded. The transaction remains valid until it was avoid. This Court then said: (SCR p.801) "The legal position will be different if there is a fraudulent misrepresentation not merely as to the contents of the document but as to its character. The authorities make a clear distinction between fraudulent misrepresentation as to the contents thereof. With reference to the former, it has been held that the transaction is void, while in the case of the latter, it is merely voidable. In Foster v. Mackinon, the action was by the endorsee of a bill of exchange. The defendant pleaded that he endorsed the bill on a fraudulent representation by the acceptor that he was signing a guarantee. In holding that such a plea was admissible, the court observed: It (signature) is invalid not merely on the ground of fraud, where fraud exists, but on the ground that

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the mind of the sign did not accompany the signature; in other words, that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended... The defendant never intended to sign that contract or any such contract. He never intended to put his name to any instrument that then was or thereafter might become negotiable. He was deceived, not merely as to the legal effect, but as to the 'actual contents' of the instrument."

ALTHOUGH NEGLIGENCE IS NOT FRAUD BUT IT CAN BE EVIDENCE ON FRAUD

Ram Preeti Yadav v. U.P. Board of High School & Intermediate Education and Ors. reported in JT 2003 (Supp. 1) SC 25 held: "Fraud is a conduct either by letter or words, which induces the other person, or authority to take a definite determinative stand as a response to the conduct of former either by words or letter. Although negligence is not fraud but it can be evidence on fraud.

BURDEN OF PROOF WHEN FRAUD MISREPRESENTATION ALLEGED AND PERSON IN DOMINATION OF OTHERS

Court in **Krishna Mohan Kul @ Nani Charan Kul and Anr. v. Pratima Maity and Ors. MANU/SC/ 0690/2003 : AIR 2003 SC 4351** . In that case, the question of burden of proof was gone into after the parties had adduced evidence. It was brought on record that the witnesses whose names appeared in the impugned deed and which was said to have been created to grab the property of the plaintiffs were not in existence. The question as regards oblique motive in execution of the deed of settlement was gone into by the Court. The executant was more than 100 years of age at the time of alleged registration of the deed in question. He was paralytic and furthermore his mental and physical condition was not in order. He was also completely bed-ridden and though his left thumb impression was taken, there was no witness who could

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substantiate that he had put his thumb impression. It was on the aforementioned facts, this Court opined:- 12 ...The onus to prove the validity of the deed of settlement was on the defendant No. 1. When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation. But, when a person is in a fiduciary relationship with another and the latter is in a position of active confidence the burden of proving the absence of fraud, misrepresentation or undue influence is upon the person, in the dominating position, he has to prove that there was fair play in the transaction and that the apparent is the real, in other words, that the transaction is genuine and bona fide. In such a case the burden of proving the good faith of the transaction is thrown upon the dominant party, that is to say, the party who is in a position of active confidence. A person standing in a fiduciary relation to another has a duty to protect the interest given to his care and the Court watches with jealously all transactions between such persons so that the protector may not use his influence or the confidence to his advantage. When the party complaining shows such relation, the law presumes everything against the transaction and the onus is cast upon the person holding the position of confidence or trust to show that the transaction is perfectly fair and reasonable, that no advantage has been taken of his position....

ONCE THE COURT DECIDES TO TAKE ACTION AGAINST FILING FORGED DOCUMENT, THEN THE COURT SHOULD MAKE A FINDING TO THE EFFECT THAT ON THE FACT SITUATION IT IS EXPEDIENT IN THE INTEREST OF JUSTICE THAT THE OFFENCE SHOULD FURTHER BE PROBED INTO

In **Pritish v. State of Maharashtra & Ors., AIR 2002 SC 236**, Court dealt with the provision of Section 340 of the Code of Criminal Procedure, 1973 extensively, in a case where admittedly forged document had been filed in a reference under Section 18 of the Land Acquisition Act, 1894 for getting a higher amount of compensation. The court observed as under :- "Reading of the sub-section makes it clear that the hub of this provision is formation of an opinion by the court (before which proceedings were to be

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held) that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed.....But once the court decides to do so, then the court should make a finding to the effect that on the fact situation it is expedient in the interest of justice that the offence should further be probed into.....It should again be remembered that the preliminary inquiry contemplated in the sub-section is not for finding whether any particular person is guilty or not. Far from that, the purpose of preliminary inquiry, even if the court opts to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed."

FILING OF FALSE AFFIDAVITS OR MAKING FALSE STATEMENT ON OATH IN COURTS

In Dhananjay Sharma v. State of Haryana, (1995) 3 SCC 757, the Supreme Court observed: .....any conduct which has the tendency to interfere with the administration of justice or the due course of judicial proceedings amounts to the commission of criminal contempt...The swearing of false affidavits in judicial proceedings not only has the tendency of causing obstruction in the due course of judicial proceedings but has also the tendency to impede, obstruct and interfere with the administration of justice. The filing of false affidavits in judicial proceedings in any court of law exposes the intention of the party concerned in perverting the course of justice. The due process of law cannot be permitted to be slighted nor the majesty of law be made a mockery of by such acts or conduct on the part of the parties to the litigation or even while appearing as witnesses. Anyone who makes an attempt to impede or undermine or obstruct the free flow of the unsoiled stream of justice by resorting to the filing of false evidence, commits criminal contempt of the court and renders himself liable to be dealt with in accordance with the Act. Filing of false affidavits or making false statement on oath in courts aims at striking a blow at the rule of law and no court can ignore such

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conduct which has the tendency to shake public confidence in the judicial institutions because the very structure of an ordered life is put at stake. It would be a great public disaster if the fountain of justice is allowed to be poisoned by anyone resorting to filing of false affidavits or giving of false statements and fabricating false evidence in a court of law...

In Afzal v. State of Haryana : (1996) 7 SCC 397, the Supreme Court held as under:... Section 2(b) defines "contempt of court" to mean any civil or criminal contempt. "Criminal contempt" defined in Section 2(c) means interference with the administration of justice in any other manner. A false or a misleading or a wrong statement deliberately and wilfully made by a party to the proceedings to obtain a favourable order would prejudice or interfere with the due course of judicial proceedings. ... He first used fabricated counter-affidavit, forged by Krishan Kumar in the proceedings to obtain a favourable order. But when he perceived atmosphere adverse to him, he fabricated further false evidence and sought to use an affidavit evidence to show that Krishan Kumar had forged his signature without his knowledge and filed the fabricated document. Thereby he further committed contempt of the judicial process. He has no regard for truth. From stage to stage, he committed contempt of court by making false statements. Being a responsible officer, he is required to make truthful statements before the Court, but he made obviously false statements. Thereby, he committed criminal contempt of judicial proceedings of this Court.

In Rita Markandey v. Surjit Singh Arora (1996) 6 SCC 14, the Supreme Court observed under: ... by filing false affidavits the respondent had not only made deliberate attempts to impede the administration of justice but succeeded in his attempts in delaying the delivery of possession. We, therefore, hold the respondent guilty of criminal contempt of court.

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In Re: Bineet Kumar Singh (2001) 5 SCC 501, the Supreme Court held as under:...Criminal Contempt has been defined in Section 2(c) to mean interference with the administration of justice in any manner. A false or misleading or a wrong statement deliberately and wilfully made by party to the proceedings to obtain a favourable order would undoubtedly tantamount to interfere with the due course of judicial proceedings. When a person is found to have utilised an order of a Court which he or she knows to be incorrect for conferring benefit on persons who are not entitled to the same, the very utilisation of the fabricated order by the person concerned would be sufficient to hold him/her guilty of contempt, irrespective of the fact whether he or she himself is the author of fabrication...

In Chandra Shashi v. Anil Kumar Verma (1995) 1 SCC 421, the Supreme Court held as under: Anyone who takes recourse to fraud, deflects the course of judicial proceedings; or if anything is done with oblique motive, the same interferes with the administration of justice...There being no decision of this Court (or for that matter of any High Court) to our knowledge on this point, the same is required to be examined as a matter of first principle. Contempt jurisdiction has been conferred on superior courts not only to preserve the majesty of law by taking appropriate action against one howsoever high he may be, if he violates court's order, but also to keep the stream of justice clear and pure ... ... so that the parties who approach the courts to receive justice do not have to wade through dirty and polluted water before entering their temples....To enable the courts to ward off unjustified interference in their working, those who indulge in immoral acts like perjury, prevarication and motivated falsehoods have to be appropriately dealt with, without which it would not be possible for any court to administer justice in the true sense and to the satisfaction of those who approach it in the hope that truth would ultimately prevail. The word _interfere', means in the context of the subject, any action which checks or hampers the functioning or hinders or tends to prevent the performance of duty ... ... obstruction of justice is to interpose obstacles or impediments, or to hinder, impede or in any manner interrupt or prevent the administration

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of justice. Now, if recourse to falsehood is taken with oblique motive, the same would definitely hinder, hamper or impede even flow of justice and would prevent the courts from performing their legal duties as they are supposed to do.... if the publication be with intent to deceive the court or one made with an intention to defraud, the same would be contempt, as it would interfere with administration of justice. It would, in any case, tend to interfere with the same. This would definitely be so if a fabricated document is filed with the aforesaid mens rea. In the case at hand the fabricated document was apparently to deceive the court; the intention to defraud is writ large.

In Dalip Singh v. State of U.P., (2010) 2 SCC 114, the Supreme Court observed that a new creed of litigants have cropped up in the last 40 years who do not have any respect for truth and shamelessly resort to falsehood and unethical means for achieving their goals. The observations of the Supreme Court are as under:-

"1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the people to ingrain these values in their daily life. Truth constituted an integral part of the justice-delivery system which was in vogue in the pre-Independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-Independence period has seen drastic changes in our value system. The materialism has over shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings. ....In last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

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GIVING FALSE EVIDENCE AND CRIMINAL ACTION - CRIMINAL CONTEMPT PROCEEDINGS ARE QUASI CRIMINAL IN NATURE AND ANY ACTION ON THE PART OF A PARTY BY MISTAKE, INADVERTENCE OR BY MISUNDERSTANDING DOES NOT AMOUNT TO CONTEMPT

R.S. Sujatha vs State Of Karnataka & Ors. Decided by Supreme Court on 29 November, 2010 Bench: Justice P Sathasivam, Justice B Chauhan The Tribunal failed to appreciate that criminal contempt proceedings are quasi criminal in nature and any action on the part of a party by mistake, inadvertence or by misunderstanding does not amount to contempt. In contempt proceedings, the court is the accuser as well as judge of the accusation. Therefore, it behoves the Tribunal to act with great circumspection as far as possible, making all allowances for errors of judgment. Any action taken in unclear case is to make the law of contempt do duty for other measures and therefore is totally unwarranted and should not be encouraged. The proceedings being quasi criminal in nature, burden and standard of proof required is the same as required in criminal cases. .....The charges have to be framed as per the statutory rules framed for the purpose and proved beyond reasonable doubt keeping in mind that the alleged contemnor is entitled to the benefit of doubt. Law does not permit imposing any punishment in contempt proceedings on mere probabilities. The court cannot punish the alleged contemnor without any foundation merely on conjectures and surmises. ..... Thus, from the above, it is evident that the inquiry/contempt proceedings should be initiated by the court in exceptional circumstances where the court is of the opinion that perjury has been committed by a party deliberately to have some beneficial order from the court. There must be grounds of a nature higher than mere surmise or suspicion for initiating such proceedings. There must be distinct evidence of the commission of an offence by such a person as mere suspicion cannot bring home the charge of perjury. More so, the court has also to determine as on facts, whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed.

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PROSECUTION SHOULD BE ORDERED WHEN IT IS CONSIDERED EXPEDIENT IN THE INTERESTS OF JUSTICE TO PUNISH THE DELINQUENT AND NOT MERELY BECAUSE THERE IS SOME INACCURACY IN THE STATEMENT WHICH MAY BE INNOCENT OR IMMATERIAL.

In **Chajoo Ram v. Radhey Shyam & Anr., AIR 1971 SC 1367**, Court while dealing with a similar issue held as under: ".....No doubt giving of false evidence and filing false affidavits is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There must be prima facie case of deliberate falsehood on a matter of substance and the Court should be satisfied that there is reasonable foundation for the charge....."

FALSITY CAN BE ALLEGED WHEN TRUTH STANDS OUT GLARINGLY AND TO THE KNOWLEDGE OF THE PERSON WHO IS MAKING THE FALSE STATEMENT

In **Chandrapal Singh & Ors. v. Maharaj Singh & Anr., AIR 1982 SC 1238**, Court while dealing with a case of a false statement for the purposes of Sections 193 and 199 IPC held as under: " ..... When it is alleged that a false statement has been made in a declaration which is receivable as evidence in any Court of Justice or before any public servant or other person, the statement alleged to be false has to be set out and its alleged falsity with reference to the truth found in some document has to be referred to pointing out that the two situations cannot co-exist, both being attributable to the same person and, therefore, one to his knowledge must be false. Rival contentions set out in affidavits accepted or rejected by courts with reference to onus probandi do not furnish foundation

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for a charge under Section 199 IPC. .....Acceptance or rejection of evidence by itself is not a sufficient yardstick to dub the one rejected as false. Falsity can be alleged when truth stands out glaringly and to the knowledge of the person who is making the false statement. Day in and day out in courts averments made by one set of witnesses are accepted and the counter-averments are rejected. If in all such cases complaints under Section 199 IPC are to be filed not only there will open up floodgates of litigation but it would unquestionably be an abuse of the process of the court....."

PLEA IN WRITTEN STATEMENT ABOUT FORGERY AND FABRICATION

H.M. Sharath Chandra and Ors. vs. N.D. Bhagyavathi and Ors.: MANU/KA/3685/2020 -

8. A perusal of the written statement already filed would categorically indicate that the written statement already contains averments as regards forgery and or fabrication alleged to have been committed by the plaintiffs and or their predecessor in as much as in the written statement, the execution of the alleged agreement of sale is denied, which would essentially mean that the agreement of sale relied upon by the plaintiffs is a forged document. Furthermore, the defendants in the written statement have stated that the plaintiffs have converted the blank signed document into document of sale agreement which would also essentially mean a forgery or a fabrication.

In the above background, the ingredients of forgery and of fabrication having already been pleaded in the written statement filed, there would be no requirement for further clarification of the same by seeking for the amendment as sought for.....

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CHAPTER-8

WITNESS AND CROSS EXAMINATION

FAILURE OF THE PLAINTIFF TO EXAMINE SCRIBE AND WITNESS OF DEED

Jagdish Chand Sharma vs. Narain Singh Saini and Ors.: MANU/SC/0522/2015 - These statutory provisions, thus, make it incumbent for a document required by law to be attested to have its execution proved by at least one of the attesting witnesses, if alive, and is subject to the process of Court conducting the proceedings involved and is capable of giving evidence. This rigour is, however, eased in case of a document also required to be attested but not a Will, if the same has been registered in accordance with the provisions of the Indian Registration Act, 1908 unless the execution of this document by the person said to have executed it denies the same. In any view of the matter, however, the relaxation extended by the proviso is of no avail qua a Will. The proof of a Will to be admissible in evidence with probative potential, being a document required by law to be attested by two witnesses, would necessarily need proof of its execution through at least one of the attesting witnesses, if alive, and subject to the process of the Court concerned and is capable of giving evidence.

In Balappa Tippanna v. Asangappa Mallappa and Anr. MANU/KA/0107/1960 : AIR1960Kant234 , the Court held as follows: The net effect of Section 68 is that if the execution of a document of gift is specifically denied, then an attesting witness must be called to prove it. If, however, such execution is not specifically denied, then it would not be necessary to call an attesting witness to prove the same. But the document all the same will have to be proved. The effect of the proviso is that the due execution and attestation of the gift deed will have to be proved,

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although it may be proved by calling a person other than an attesting witness.

Brij Raj Singh [Dead] by L.Rs. and Ors. vs. Sewak Ram and Ors. : MANU/SC/0290/1999 - The gift deed was executed by the original owner and presented for registration by a duly authorised power of attorney and the document was duly attested by 2 witnesses, out of whom one was examined to prove the deed and nothing more is required to satisfy the requirements of Section 123 of Transfer of Property Act, particularly when no specific denial was taken to the execution or attestation of the gift deed in the written statement or even subsequently before the trial court.

Court in M.L. Abdul Jabhar Sahib v. H.V. Venkata Sastri & Sons & Ors. MANU/SC/0019/1969 : [1969]3SCR513 wherein Court upon reference to Section 3 of the Transfer of Property Act has the following to state: "It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under s. 3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgement of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witnesses should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

N. Kamalam (Dead) and Ors. vs. Ayyasamy and Ors. : MANU/SC/0422/2001 - it is now a fairly well-settled principle that the same lies in every case upon the party propounding the will and may satisfy the court's conscious that the instrument as propounded is the last will of a free and capable testator, meaning

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thereby obviously, that the testator at the time when he subscribed his signature on to the will had a sound and disposing state of mind and memory and ordinarily, however, the onus is discharged as regards the due execution of the will if the propounder leads evidence to show that the will bears the signature and mark of the testator and that the will is duly attested. This attestation however, shall have to be in accordance with Section 68 of the Evidence Act which requires that if a document is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution and the same is so however, in the event of there being an attesting witness alive and capable of giving the evidence. The law is also equally well-settled that in the event of there being circumstances surrounding the execution of the will, shrouded in suspicion, it is the duty paramount on the part of the propounder to remove that suspicion by leading satisfactory evidence. .....The animus to attest, thus, is not available, so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will. The statutory requirement as noticed above cannot thus be transposed in favour of the writer rather goes against the propounder since both the witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the court so as to satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to the proof of due attestation unless the situation is so expressed in the document itself - this is again however not the situation existing presently in the matter under consideration. Some grievance was made before this court that sufficient opportunity was not being made available, we are however unable to record our concurrence therewith. No attempt whatsoever has been made to bring the attesting witnesses who are obviously available. ..... While it is true that Arunachalam in the facts of the matter under consideration did write the will and has also signed it but it is of utmost requirement that the document ought to be signed by the witnesses in order to have the statutory requirement fulfilled Arunachalam has signed the document as a scribe not as a witness, if there were no signatures available as witness, probably we would have to specifically deal with such a situation and consider that aspect of the matter but presently in

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the facts situation of the matter under consideration, we have the advantage of two attesting witnesses, none of whom have been examined and the factum of their non availability also does not satisfactorily been proved. The evidence of one person namely Arunachalam cannot displace the requirement of the statute when Arunachalam himself has specifically identified himself as Writer and not as a witness though in his evidence, he tried to improve the situation but this improvement however cannot said to be accepted. The Will thus fails to have its full impact and its effect stands out to be honest.

ATTESTING WITNESS DEAD - MODE OF PROOF

Parappa and Ors. vs. Bhimappa and Ors.: MANU/KA/0059/2008 - The execution or authorship of a document being a question of fact, it can be proved like any other fact by direct or circumstantial evidence. Therefore, it necessarily follows that if the attesting witness are not alive, persons who are well acquainted with the handwriting or signature of the attesting witness should be examined to prove the signature of the attesting witness. When the handwriting of a dead attesting witness have been proved, there is presumption of, in the absence of rebutting evidence, that they have witnessed the execution. When all the attesting witnesses are dead, requirement of law would be satisfied by any evidence showing that the document was executed in the presence of two attesting witnesses. Therefore, when attesting witness is not alive, the parties are not helpless and the law provides for proving the signature of the attesting witness also.

COURT DISCREETION TO RECALL WITNESS

MANU/SC/0448/2009 : (2009) 4 SCC 410 - Vadiraj Naggappa Vernekar vs. Sharadchandra Prabhakar Gogate; It was held therein that some of the principles akin to Order XLVII of the Code(review of judgement) may be applied in an application under Order XVIII Rule 17(recall of witness by court), but it is ultimately within the court's discretion to allow such an application.

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CALLING WITNESS AT ANY STAGE - 1999 AMENDMENT DOES NOT TAKE AWAY THE COURT'S INHERENT POWER TO CALL FOR ANY WITNESS AT ANY STAGE

SALEM ADVOCATE BAR ASSOCIATION,TAMIL NADU VS UNION OF INDIA AIR 2005 SC 3353 BENCH: Y.K.SABHARWAL, D.M.DHARMADIKHARI & TARUN CHATTERJEE

The omission of Order XVIII Rule 2(4) by the 1999 amendment does not take away the Court's inherent power to call for any witness at any stage either suo moto or on the prayer of a party invoking the inherent powers of the Court.

RE-OPEN AND RECALL OF WITNESS - POWER UNDER ORDER 18 RULE 17 CPC IS TO BE SPARINGLY EXERCISED AND IN APPROPRIATE CASES AND NOT AS A GENERAL RULE

In Vadiraj Naggappa Vernekar (dead) through LRs. vs. Sharadchandra Prabhakar Gogate, (2009) 4 SCC 410, this Court had an occasion to consider similar claim, particularly, application filed under Order XVIII Rule 17 and held as under: "25. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined. ..... The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC. ..... It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but

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to clear any ambiguity that may have arisen during the course of his examination. ..... Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out."

REGISTRAR OF DEEDS IS NOT AN ATTESTING WITNESS 2004 SC

Bhagat Ram And Anr. vs Suresh And Ors. AIR 2004 SC 436, The Registrar of Deeds who had registered a document in discharge of his statutory duty, does not become an attesting witness to the deed solely on account of his having discharged the statutory duties relating to the registration of a document. Registration of any will, and the endorsements made by the Registrar of Deeds in discharge of his statutory duties do not elevate him to the status of a 'statutory attesting witness'. However, a registrar can be treated as having attested to a will if his signature or mark appears on the document akin to the one placed by an attesting witness and he has seen the testator sign or affix his mark to the will or codicil or has received from the testator a personal acknowledgement of his signature or mark and he has also signed in the presence of the testator. In other words, to be an attesting witness, the registrar should have attested the signature of the testator in the manner contemplated by Clause (c) of Section 63 of the Succession Act. No particular form of attestation is provided. It will all depend on the facts and circumstances of a case by reference to which it will have to be answered if the registrar of deeds fulfils the character of an attesting witness also by looking at the manner in which the events have actually taken place at the time of registration and the part played therein by the Registrar. .. A Registrar of Deeds before he be termed an attesting witness, shall have to be called in the witness box. The court must feel satisfied by his testimony that what he did satisfies the requirement of being an attesting witness. ..... Registration of a document does not dispense with the need of proving the execution

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and attestation of a document which is required by law to be proved in one manner as provided in Section 68 of the Evidence Act. Under Section 68 of the Registration Act the Registrar shall endorse the following particulars on every document admitted to registration:

(1) the date, hour and place of presentation of the document for registration;

(2) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign of agent of any person, the signature and addition of such representative, assign or agent;

(3) the signature and addition of every person examined in reference to such document under any of the provisions of this Act, and

(4) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

Such particulars as are referred to in Sections 52 and 58 of the Registration Act are required to be endorsed by Registrar alongwith his signature and date on document under Section 59 and then certified under Section 60. A presumption by reference to Section 114 (Illustration (e)) of the Evidence Act shall arise to the effect that the events containing in the endorsement of registration, were regularly and duly performed and are correctly recorded. None of the endorsements, require to be made by the Registrar of Deeds under the Registration Act, contemplates the factum of attestation within the meaning of Section 63(c) of the Succession Act or Section 68 of the Evidence Act being endorsed or certified by the Registrar of Deeds. The endorsements made at the time of registration are relevant to the matters of the registration only (See: Kunwar Surendra Bhadur Singh and Ors. v. Thakur Behari Singh and Ors., . On account of registration of a document, including a will or codicil, a presumption as to correctness or regularity of attestation cannot be drawn. Where in the facts and circumstances of a given case the Registrar of Deeds satisfies the requirement of an attesting witness, he must be called in the witness box to

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depose to the attestation. His evidence would be liable to be appreciated and evaluated like the testimony of any other attesting witness.

A PARTY TO AN INSTRUMENT CANNOT BE A VALID ATTESTING WITNESS TO THE SAID INSTRUMENT

Laxmibai (Dead) Thru Lrs. & Anr. vs Bhagwanthbuva (Dead) Thru Lrs 2013 (2) JT 362 = 2013 (2) SCALE 106 A party to an instrument cannot be a valid attesting witness to the said instrument, for the reason, that such party cannot attest its own signature. (Vide: Kumar Harish Chandra Singh Deo & Anr. v. Bansidhar Mohanty & Ors., AIR 1965 SC 1738). ... A document must be construed, taking into consideration the real intention of the parties. The substance, and not the form of a document, must be seen in order to determine its real purport.

TESTIMONY OF THE INTERESTED WITNESSES IN SUPPORT OF ORAL AGREEMENT CANNOT BE RELIED UPON

In the case of S.R. Balakrishnan and another v. Yakoob and Others reported in MANU/KE/0603/2001 : AIR 2001 KERALA 215, it is specifically reiterated that testimony of the interested witnesses in support of oral agreement cannot be relied upon. Convincing evidence must be placed on record to establish the terms of the oral agreement.

Hon'ble Apex Court in the case of Ouseph Varghese v. Joseph Aley and Others reported in MANU/SC/0493/1969 : 1992 (2) SCC 539. It has specifically held that burden of proving the oral agreement in a suit filed for specific performance is always heavy and it has to be satisfactorily proved. Plea of readiness and willingness must not only be satisfactorily pleaded but also satisfactorily proved by placing acceptable evidence. Readiness means financial capacity

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of the person intending to purchase the property right from the date of oral agreement upto the date of obtaining sale deed. Willingness is the eagerness to have the sale deed. Though both of these aspects are different, these aspects will have to be satisfactorily proved.

NO MATERIAL CAN BE RELIED UPON TO ESTABLISH A CONTESTED FACT WHICH ARE NOT SPOKEN TO BY THE PERSONS WHO ARE COMPETENT TO SPEAK ABOUT THEM AND ARE SUBJECT TO CROSS-EXAMINATION

M/s Bareilly Electricity Supply Co. Ltd. v. The Workmen & Ors., AIR 1972 SC 330, considered the application of Order XIX, Rules 1 and 2 CPC, and observed as under:- "But the application of principles of natural justice does not imply that what is not evidence, can be acted upon. On the other hand, what it means is that no material can be relied upon to establish a contested fact which are not spoken to by the persons who are competent to speak about them and are subject to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal, the question that naturally arises is: is it a genuine document, what are its contents and are the statements contained therein true..... If a letter or other document is produced to establish some fact which is relevant to the inquiry, the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accordance with the principles of natural justice as also according to the procedure under O. 19 of the Code and the Evidence Act, both of which incorporate the general principles."

In Needle Industries (India) Ltd. & Ors. v. N.I.N.I.H. Ltd. & Ors., AIR 1981 SC 1298, this Court considered a case under the Indian Companies Act, and observed that, "it is generally unsatisfactory to record a finding involving grave consequences with respect to a person, on the basis of affidavits and documents alone, without asking that person to submit to cross-examination".

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IN A CASE WHERE THE DEPONENT IS AVAILABLE FOR CROSS-EXAMINATION, AND OPPORTUNITY IS GIVEN TO THE OTHER SIDE TO CROSS-EXAMINE HIM, THE SAME CAN BE RELIED UPON

AYAAUBKHAN NOORKHAN PATHAN VS STATE OF MAHARASHTRA & ORS. AIR 2013 SC 58 Therefore, affidavits in the light of the aforesaid discussion are not considered to be evidence, within the meaning of Section 3 of the Evidence Act. However, in a case where the deponent is available for cross-examination, and opportunity is given to the other side to cross-examine him, the same can be relied upon. Such view, stands fully affirmed particularly, in view of the amended provisions of Order XVIII, Rules 4 & 5 CPC. In certain other circumstances, in order to avoid technicalities of procedure, the legislature, or a court/tribunal, can even lay down a procedure to meet the requirement of compliance with the principles of natural justice, and thus, the case will be examined in the light of those statutory rules etc. as framed by the aforementioned authorities.

AFFIDAVIT CANNOT BE RELIED WITHOUT CROSS EXAMINATION OF DEPONENT

Bareilly Electricity Supply Co.Ltd vs The Workmen (AIR 1972 SC 330) the affidavit could not have been relied upon without the author being put through the test of cross examination.

PARTY SHALL PUT HIS CASE IN CROSS EXAMINATION

Sarwan Singh vs. State of Punjab-MANU/SC/0868/2002 : (2003) 1 SCC 240, certain extracts from paragraph No. 9 of the judgment would run thus: "9. ..... It is a rule of essential justice that whenever the opponent has declined to avail himself of the

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opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted.. . . . . "

S. Deivanai and others vs. V.M. Kothandaraman-MANU/TN/1897/2017 : 2017(4) CTC 734, certain extracts from paragraph No. 39 would run thus: "39. From a perusal of the materials on record, we are of the opinion that the defendants have not denied the case of the plaintiff by putting suggestion in the cross-examination of P.W. 1. Failure to cross-examine on this aspect has resulted in establishment of the fact by the plaintiff that the plaintiff has proved that he was ready and willing to perform his part of the contract ....."

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CHAPTER-8

GENERAL PRINCIPLES

PRINCIPLES OF EVIDENCE CULLED OUT OF PRECEDENTS

Patel Ramanbhai Mathurbhai vs. Govindbhai Chhotabhai Patel and Ors.: MANU/GJ/0774/2018

[a] The general principles of law that can be gainfully culled out from the judicial pronouncements noted above is that the burden of proof cast under Sections 101 and 102 of the Indian Evidence Act, 1872 is the persuasive burden or the onus probandi. The persuasive burden to prove and establish the case always lies upon the plaintiff and the said burden never shifts upon the defendant. What may, however, shift is the onus to lead evidence in the sense that once the plaintiff side succeeds in prima facie establishing his pleaded case by leading evidence, the onus will then shift upon the defendant side to lead evidence so as to disprove the case. The parties may also have to discharge the burden of establishing the admissibility of the evidence by leading evidence in respect thereof. The initial burden to establish the basic allegations made in the plaint constituting the foundational facts, regardless of whether such assertion is couched in the affirmative or in the negative, would undoubtedly lie upon the plaintiff and the failure to discharge the said burden must lead to the dismissal of the suit."

[b] The burden of proof on the pleadings should not be confused with the burden of adducing evidence.

[c] Pleading is not evidence, far less proof.

[d] The rule that the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it, is not one of the universal applications and there may be exception thereto.

[e] The inference of fraud can be drawn only from the positive materials on record and cannot be based on speculation and surmises. However, the suspicious circumstances, however, strange the co-incidences and however grave the doubts, they alone cannot take place of proof of fraud.

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[f] The evidence of fraud must be sufficient to overcome the natural presumption of honesty and fair dealing. It is not to be presumed or inferred lightly.

[g] When the plaintiff comes before the Court with a case of forgery, then he has to prove the forgery in accordance with law. A mere assertion or allegation of forgery is not sufficient to shift the onus on the other side to establish that there is no forgery.

[h] It is always open to the defendant not to lead any evidence where the onus is upon the plaintiff. After having gone into the evidence, he cannot ask the Court not to look at it and act on it. The question of burden of proof at the end of the case when both the parties have tendered evidence is not of any great importance and the Court has to give a decision on a consideration of all the materials.

Union of India (UOI) and Ors. vs. Vasavi Co-op. Housing Society Ltd. and Ors.: MANU/SC/ 0001/2014 - The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. In view of this Court even if the title set up by the defendants is found against, in the absence of establishment of plaintiffs own title, plaintiff must be non-suited. ..... It is trite law that, in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

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PLAINTIFF HAS TO PROVE HIS OWN CASE AND CANNOT TAKE ADVANTAGE OF WEAKNESS OF THE CASE OF THE DEFENDANT.

Punjab Urban Planning and Development Authority v. Shiv Saraswati Iron and Steel Mills, MANU/SC/0234/1998 : 1998 ACJ 1006, wherein, it has been held that plaintiff has to prove his own case and cannot take advantage of weakness of the case of the defendant.

Hon'ble Supreme Court has held in the case of UNION OF INDIA AND OTHERS v. VASAVI COOPERATIVE HOUSING SOCIETY LIMITED AND OTHERS, reported in MANU/SC/0001/2014 : (2014) 2 SCC 269, that the plaintiff should win the case by proving his case; he cannot win the case on the weakness of his adversary.

ABSENCE OF WRITTEN STATEMENT - DEFENDANT CANNOT PRODUCE ANY EVIDENCE

Rajinder Tiwari vs. Kedar Nath (Deceased) thr. L.Rs. and Ors.: MANU/SC/0430/2019 - In absence of any written statement, Defendant could neither adduce proper evidence nor file any documentary evidence in support of his case.

NO NEED FOR PURCHASER TO VERIFY FROM DOOR TO DOOR

Abdul Mazid vs. Burhanuddin Ahmed and Ors.: MANU/GH/0015/1980 - A person interested to purchase, is not bound to go from door to door to know whether the property was true. It would be sufficient if he knew about the property from the record. In the instant case there was never any inspectable record. As such there was never any lach on the part of the defendants as argued by the learned Lawyer for the plaintiff. From all the facts and circumstances proved in the case it is held that defendants 2

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and 3 were bona fide purchasers for value without notice and as such their interest is protected.

WORD "NOTICE" IS OF WIDER IMPORT THAN THE WORD "KNOWLEDGE"

Bhagawan and Ors. vs. Dwarakanath and Ors.: MANU/KA/0484/2004 - Notice could be actual or constructive or deemed or implied. However, from the definition of the expression "a person is said to have notice" in Section 3 of the Transfer of Property Act, it is plain that the word "notice" is of wider import than the word "knowledge". A person may not have actual knowledge of a fact but he may have notice of it having regard to the aforementioned definition and Explanation II thereto. If the purchaser rely upon the assertion of the vendor or on his own knowledge and abstain from making inquiry into the real nature of the possession of a tenant, he cannot escape from the consequences of the deemed notice under Explanation II to Section 3 of the Transfer of Property Act. In view of the said Explanation II, a statutory presumption of notice arises against any person, who acquires any immovable property or any share or interest of the title, if any, of the person who is for the time being in actual possession thereof. This view finds support from the decision of the Supreme Court in the case of RAM NIWAS (DEAD) THROUGH L.Rs. v. BANO (SMT) AND ORS., MANU/SC/0468/2000 : AIR2000SC2921 wherein the purchasers were held to have deemed notice.

Recently, in the case of R.K. MOHAMMED UBAIDULLAH AND ORS. v. HAJEE C. ABDUL WAHAB (D) BY L.Rs. AND ORS., MANU/SC/0433/2000 : AIR2001SC1658 the Supreme Court has held thus. "18. One of the circumstances that was held against the subsequent purchasers was that the parties were residents or had shops in the same vicinity and it was not probable that the subsequent purchasers would not have come to know of the execution of the agreement..... 19. In view of what is stated above, it is clear that the defendants 2 to 5 were not bonafide purchasers for value without prior notice of the original contract

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and that they were required to make inquiry as to the nature of possession or title or further interest if any of the plaintiff over the suit property at the time when they entered into sale transaction notwithstanding they were already aware that the plaintiff was in possession of the property as the tenant. What is material is the inquiry at the time when subsequent sale transaction was entered into."

SUIT FILED WITH INTENTION TO EXTRACT MONEY FROM PURCHASERS

R. Venkataswamy Reddy and Ors. vs. Shantha Abraham and Ors.: MANU/KA/0513/2020 - It is also pertinent to note that suits are filed against several persons and it is emerged in evidence that except these defendants, relief sought against other defendants are withdrawn and categorically admitted that they have collected money from them and withdrawn suit - Hence, it is clear that suit is filed only with an intention to extract money from prospective purchasers - Very conduct of plaintiffs is clear that in order to extract money and to make wrongful gain, suits were filed against defendants, in spite of that, sale deeds were executed by their father and also by power of attorney holder of their father - Hence, plaintiffs have not approached Court with clean hands seeking relief of declaration - Having considered material available on record both oral and documentary evidence and also admissions, Court below has not committed any error in dismissing suit of plaintiffs.

NECESSARY PLEADINGS

Supreme Court in OUSEPH VERGHESE v. JOSEPH ALEY, MANU/SC/0493/1969 : [1970]1SCR921 , observed as follows:- "A suit for specific performance has to confirm to the requirements prescribed in Form 47 and 48 of the 1st Schedule in the Civil Procedure Code. In a suit for specific performance it is incumbent on the plaintiff not only to set out agreement on the basis of which he sues in all its details, he must go further and plead that he has applied to the defendant specifically to perform the agreement

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pleaded by him but the defendant has not done so. He must further plead that he has been and is still ready and willing to specially perform his part of the agreement."

B.B. BANGARSHETTAR v. SMT. IRAWWA AND ORS., MANU/KA/0136/1988 : AIR 1988 Kant 174 ., is worth recalling. It is observed at para-9 as follows;- "It is now well settled by a catena of decisions in this country that while it is not necessary that the Court should insist on precise pleadings, having regard to many factors such as property, ignorance, illiteracy, etc it is not, however, conceded that without pleading, which is understandable by the Court as well as by the opposite party, issues must be raised or framed and even without evidence supporting such un-raised issues, the Court should give relief." .....It is further observed at Para-11 as follows:- "We do not think, we should stretch the liberal approach in the matter of pleadings to such an extent as to draw inference on arithmetical figures indicated by the parties."

Supreme Court in RAM SARUP GUPTA v. BISHUN NARAIN INTER COLLEGE, MANU/SC/0043/1987 : [1987]2SCR805 observed as follows:- "It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case sat up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should state the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction, no pedantic approach should be adopted to defeat justice on hair splitting technicalities, sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law, in such a case it is the duty of the Court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered.

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Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of pleadings, instead the Court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal."

C.N. Ranganath vs. M.R. Thyagaraja: MANU/KA/0526/1996 - Court should not throw out the case of the parties on technicalities of pleadings. It is also not desirable to lay undue emphasis more on the form, than on the content. The emphasis' on both sides is that no pleading is perfect. Every Advocates has his own way of drafting pleadings. Drafting of pleadings is an art in itself. But the law of pleadings expect the parties to present their pleadings in conformity with the well laid down principles. If a statute contemplates pleadings in a particular manner, it should be pleaded in that language. Invariably drafting of pleadings is made on the basis of the forms prescribed in CPC or from available in the text books of law of pleadings. Pleadings do contain both the facts and law on which the parties rely. Therefore, when the question of absence of pleading is raised for the first time, the Court has to consider whether the pleadings made by the parties convey sufficient meaning in terms of the statutory requirements more so when a statute prescribes the standard..... In a suit for specific performance what is required to be pleaded by the plaintiff is that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant and that he has to notify the other party about his readiness and willingness to perform the said contract and that actually tender the money in proof of his readiness.

DELAY TACTICS

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MANU/SC/0714/2011 : (2011) 8 SCC 249 - Ramrameshwari Devi & Ors. vs. Nirmala Devi & Ors.; In this judgment, abuse of process of court by adopting dilatory tactics was deprecated.

MANU/SC/0267/2011 : (2011) 11 SCC 275 - K.K. Velusamy vs. N. Palanisamy, wherein it was held that the power to recall a witness under Order XVIII Rule 17 of the Code of Civil Procedure should be used sparingly in appropriate cases to enable the court to clarify any issue or doubt it may have in regard to the evidence led by the parties, but not intended to be used to fill up omissions in the evidence of a witness who has already been examined or to enable recall of any witness to place additional material or evidence which could not be produced when the evidence was being recorded. However, production of additional evidence could be permitted under Section 151 of the Code even after deletion of Order XVIII Rule 17A upon ensuring that such prayer was not a dilatory tactic.

QUESTIONS OF FACT COULD NOT BE REOPENED IN REVISION

MANU/SC/0035/1976 : (1976) 4 SCC 66 - Y.B. Patil & Ors. vs. Y.L. Patil, for the proposition that questions of fact could not be reopened in revision.

RECORDING OF EVIDENCE THROUGH VIDEO CONFERENCING

V. Rama Naidu and Ors. vs. V. Ramadevi: MANU/AP/0286/2018 - Whether evidence can be recorded by Video Conference concerned, the Apex Court in State of Maharashtra v. Dr. Praful B. Desai MANU/SC/0268/2003 : 2003 CrLJ 2033 : (2003) 4 SCC 601 held that recording of evidence even in a criminal case by way of video conferencing is permissible. So long as the accused and/or his pleader is present when the evidence is recorded by the said way it is recording of evidence in

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the presence of the accused as per the requirements of Section 273 CrPC as per the procedure established by law. The term presence does not mean actual physical presence as it includes even virtual presence in Court by video and audio linkage between both ends. Evidence since oral and documentary it can be produced by way of electronic records including video conference with in the definition of Section 3 Evidence Act. The Apex Court laid down certain guidelines and conditions to record the evidence through Video Conferencing. Similarly in a civil case in Twentieth Century Fox Film Corp v. NRI Firm Production Associates (P) Ltd. MANU/KA/0060/2003 : 2003 (3) ILD 505 (Karnataka) it was held that hearing suit and examination of witnesses and recording of evidence by commissioner contemplated by Order 18 Rule 4 from the words Witness in attendance are to be understood as person being present and it need not be physical presence thus, recording of evidence through Audio, Video link is permissible complying the words in attendance. There are guidelines laid down therein for the precautions to be taken in recording such evidence.

COURT COMMISSIONER APPOINTEMENT FOR EVIDENCE

The Apex Court in Salem Advocates Bar Association, Tamilnadu v. Union of India MANU/SC/0450/2005 : (2005) 6 SCC 344 (for short Salem Bar Association case-II) regarding the advocate commissioners appointment by Court to record evidence of witnesses and fees payable by the parties observed referring to the 3 reports of Justice Jagannadha Rao Committee appointed by the Apex court from the judgment in Salem Bar Association case-I that: "Amendment of Order XVIII Rule 4 provides that in every case, the examination-in- chief of a witness shall be on affidavit. The Court has already been vested with power to permit affidavits to be filed as evidence as provided in Order XIX Rules 1 and 2 of the Code. It has to be kept in view that the right of cross-examination and re- examination in open court has not been disturbed by Order XVIII Rule 4 inserted by amendment It is true that after the amendment cross-examination can be before a Commissioner but we feel that no exception can be taken in regard

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to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order XVIII Rule 4 has been examined and its validity upheld in Salem Advocates Bar Association's case. There is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of examination-in-chief. Further, in Salem Advocates Bar Association's case, it has been held that the trial court in appropriate cases can permit the examination-in-chief to be recorded in the Court. Proviso to sub-rule (2) of Rule 4 of Order XVIII clearly suggests that the court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in court or by the Commissioner appointed by it. The power under Order XVIII Rule 4(2) is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the court to appoint Commissioner to record cross-examination and reexamination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad and general guidelines for the exercise of discretion. For instance, a case may involve complex question of title, complex question in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, serious disputes as to the execution of the will etc. In such cases, as far as possible, the court may prefer to itself record the cross-examination of the material witnesses. Another contention raised is that when evidence is recorded by the Commissioner, the Court would be deprived of the benefit of watching the demeanour of witness. That may be so but, In our view, the will of the legislature, which has by amending the Code provided for recording evidence by the Commissioner for saving Court's time taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanour of the witnesses. Further, as noticed above, in some cases, which are complex in nature, the prayer for recording evidence by the Commissioner may be declined by the Court. It may also be noted that Order XVIII Rule

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4, specifically provides that the Commissioner may record such remarks as it thinks material in respect of the demeanour of any witness while under examination. The Court would have the benefit of the observations if made by the Commissioner. The report notices that in some States, advocates are being required to pass a test conducted by the High Court in the subjects of Civil Procedure Code and Evidence Act for the purpose of empanelling them on the panels of Commissioners. It is a good practice. We would, however, leave it to the High Courts to examine this aspect and decide to adopt or not such a procedure. Regarding the apprehension that the payment of fee to the Commissioner will add to the burden of the litigant, we feel that generally the expenses incurred towards the fee payable to the Commissioner is likely to be less than expenditure incurred for attending the Courts on various dates for recording evidence besides the harassment and inconvenience to attend the Court again and again for the same purpose and therefore, in reality in most of the cases. there could be no additional burden.

Amendment to Order XVIII Rule 5(a) and (b) was made in 1976 whereby it was provided that in all appealable cases evidence shall be recorded by the Court. Order XVIII Rule 4 was amended by Amendment Act of 1999 and again by Amendment Act of 2002. Order XVIII Rule 4(3) enables the commissioners to record evidence in all type of cases including appealable cases. The contention urged is that there is conflict between these provisions.

To examine the contention, it is also necessary to keep in view Order XVIII Rule 19 which was inserted by Amendment Act of 1999. It reads as under: "Power to get statements recorded on commission. Notwithstanding anything contained in these rules, the Court may. instead of examining witnesses in open Court, direct their statements to be recorded on commission under Rule 4A of the Order XXVI."

The aforesaid provision contains a non-obstante clause. It overrides Order XVIII Rule 5 which provides the court to record evidence in all appealable cases. The Court is, therefore, empowered to appoint a Commissioner for recording of evidence in appealable cases as well. Further. Order XXVI Rule 4-A inserted by Amendment Act of 1999 provides that notwithstanding

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anything contained in the Rules, any court may in the interest of justice or for the expeditious disposal of the case or for any other reason, issue Commission in any suit for the examination of any person resident within the local limits of the court's jurisdiction. Order XVIII Rule 19 and Order XXVI Rule 4- A. in our view, would override Order XVIII Rule 5(a) and (b). There is, thus, no conflict. The next question that has been raised is about the power of the Commissioner to declare a witness hostile. Order XVIII Rule 4(4) requires that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments. Order XVIII Rule 4(8) stipulates that the provisions of Rules 16, 16-A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commission thereunder. The discretion to declare a witness hostile has not been conferred on the Commissioner. Under Section 154 of the Evidence Act, it is the Court which has to grant permission, in its discretion, to a person who calls a witness. to put any question to that witness which might be put in cross- examination by the adverse party. The powers delegated to the Commissioner under Order XXVI Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in Court under Section 154 of the Evidence Act to declare a witness hostile.

If a situation as to declaring a witness hostile arises before Commission recording evidence, the concerned party shall have to obtain permission from the Court under Section 154 of the Evidence Act and it is only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the Court may either grant such permission or even consider to withdraw the commission so as to itself record remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party. Another aspect is about proper care to be taken by the Commission of the original documents. Undoubtedly. the Commission has to take proper care of the original documents handed over to him '. either by Court or filed before him during recording of evidence. In this regard, the High Courts may frame necessary rules. regulations or issue practice

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directions so as to ensure safe and proper custody of the documents when the same are before the Commissioner. It is the duty and obligation of the Commissioners to keep the documents in safe custody and also not to give access of the record to one party in absence of the opposite party or his counsel. The Commissioners can be required to redeposit the documents with the Court in case long adjournments are granted and for taking back the documents before the adjourned date.

In D. Chandrakala v. SMS Sangam MANU/AP/0922/2006 : 2007 (1) ALT 230, Court observed that in complex cases like suit for declaration of title based on will where execution of will in dispute and cases where expert gave opinion on disputed signatures etc., Court can record evidence declining request to appoint commissioner; however, commissioners appointment to record evidence of scribe or attestors or expert witness can be considered, leave about no impediment to the Court to summon a witness sought to be examined on commission.

In T. Srinivasa Rao v. T.V. Rangaiah MANU/AP/0618/2006 : 2006 (5) ALD 823, Court observed that examination of witness by commission is not as a matter of course and recourse would depend upon the pressure of work in the Court and condition of witness since each and every step in the adjudicatory process has its own impact on the ultimate outcome and credibility of entire system.

In Qamar Begum v. Habeebunnisa MANU/AP/0993/2006 : 2007 (2) ALT 1 : 2007 (1) ALD 515, Court observed that appointment of a commissioner to record evidence of a witness is not as a matter of course as held in Srinivasa Rao supra for Courts participation in recording evidence is necessary in complicated cases.

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In Vemunandana Ramakrishnam Raju v. Darla Srinivas MANU/AP/0142/2016 : 2016 (5) ALT 26 : 2016(3) ALD 516, Court observed that the casual appointment of a commissioner to record evidence without assigning reasons is not proper.

EXISTENCE OF PARTICULAR FACTS

B.P. Achala Anand Vs. S. Appi Reddi & Anr reported in MANU/SC/0100/2005 : AIR 2005 S.C. 986, in which the Hon'ble Supreme Court observed that "unusual fact situation posing issues for resolution is an opportunity for innovation. Law, as administered by courts, transforms justice. Thus, it is evident that while deciding the case, court has to bear in mind the particular facts, if so exist, in a given case."

THE FACTUM OF PARTITION WAS EVIDENCED BY ENTRIES IN THE RECORD OF RIGHTS

The case of **Digambar Adhar Patel v. Devram Girdhar Patil [Died] [1995 suppl (2) SCC 428]** is about record of rights and its functionary value vis-a-vis when the factum of partition was evidenced by entries in the Record of Rights, under the Hindu Law, it is not necessary that the partition should be effected by a registered partition deed.

PRESUMTIVE AND PROBATIVE VALUE OF ENTRIES MADE IN OFFICIAL RECORD

(2010) 9 SCC 209 [Madan Mohan Singh and others vs. Rajni Kant and another “Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma Vs. State of

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Bihar AIR 1970 SC 326; Ram Murti Vs. State of Haryana AIR 1970 SC 1029; Dayaram & Ors. Vs. Dawalatshah & Anr. AIR 1971 SC 681; Harpal Singh & Anr. Vs. State of Himachal Pradesh AIR 1981 SC 361; Ravinder Singh Gorkhi Vs. State of U.P. (2006) 5 SCC 584; Babloo Pasi Vs. State of Jharkhand & Anr. (2008) 13 SCC 133; Desh Raj Vs. Bodh Raj AIR 2008 SC 632; and Ram Suresh Singh Vs. Prabhat Singh @Chhotu Singh & Anr. (2009) 6 SCC 681. In these cases, it has been held that even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases. ..... Such entries may be in any public document, i.e. school register, voter list or family register prepared under the Rules and Regulations etc. in force, and may be admissible under Section 35 of the Evidence Act as held in Mohd. Ikram Hussain Vs. The State of U.P. & Ors. AIR 1964 SC 1625; and Santenu Mitra Vs. State of West Bengal AIR 1999 SC 1587. ..... So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases. ..... For determining the age of a person, the best evidence is of his/her parents, if it is supported by un-impeccable documents. In case the date of birth depicted in the school register/certificate stands belied by the un-impeccable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government Hospital/Nursing Home etc, the entry in the school register is to be discarded. (Vide: Brij Mohan Singh Vs. Priya Brat Narain Sinha & Ors. AIR 1965 SC 282; Birad Mal Singhvi Vs. Anand Purohit AIR 1988 SC 1796; Vishnu Vs. State of Maharashtra

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(2006) 1 SCC 283; and Satpal Singh Vs. State of Haryana JT 2010 (7) SC 500). ..... If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time etc. mentioned therein. (Vide: Updesh Kumar & Ors. Vs. Prithvi Singh & Ors., (2001) 2 SCC 524; and State of Punjab Vs. Mohinder Singh, AIR 2005 SC 1868). ..... In S. Khushboo Vs. Kanniammal & Anr. (2010) 5 SCC 600, this Court, placing reliance upon its earlier decision in Lata Singh Vs. State of U.P. & Anr. AIR 2006 SC 2522, held that live-in-relationship is permissible only in unmarried major persons of heterogeneous sex. ..... In S.P.S. Balasubramanyam Vs. Suruttayan @ Andali Padayachi & Ors. AIR 1992 SC 756, this Court held that if man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Evidence Act, that they live as husband and wife and the children born to them will not be illegitimate. ..... The courts have consistently held that the law presumes in favour of marriage and against concubinage, when a man and woman have cohabited continuously for a number of years. However, such presumption can be rebutted by leading unimpeachable evidence. (Vide: Mohabbat Ali Khan Vs. Mohd. Ibrahim Khan, AIR 1929 PC 135; Gokalchand Vs.. Parvin Kumar, AIR 1952 SC 231; S.P.S. Balasubramanyam Vs. Suruttayan, (1994) 1 SCC 460; Ranganath Parmeshwar Panditrao Mali Vs. Eknath Gajanan Kulkarni, (1996) 7 SCC 681; and Sobha Hymavathi Devi Vs. Setti Gangadhara Swamy & Ors., (2005) 2 SCC 244).

EVIDENCE IN APPELLATE STAGE

Union Of India vs Ibrahim Uddin & Anr on 17 July, 2012 , Dr. B. S. CHAUHAN, J., The general principle is that the Appellate Court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception,

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Order XLI Rule 27 CPC enables the Appellate Court to take additional evidence in exceptional circumstances. The Appellate Court may permit additional evidence only and only if the conditions laid down in this rule are found to exist. The parties are not entitled, as of right, to the admission of such evidence. Thus, provision does not apply, when on the basis of evidence on record, the Appellate Court can pronounce a satisfactory judgment. The matter is entirely within the discretion of the court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. (Vide: K. Venkataramiah v. A. Seetharama Reddy & Ors., AIR 1963 SC 1526; The Municipal Corporation of Greater Bombay v. Lala Pancham & Ors., AIR 1965 SC 1008; Soonda Ram & Anr. v. Rameshwaralal & Anr., AIR 1975 SC 479; and Syed Abdul Khader v. Rami Reddy & Ors., AIR 1979 SC 553).

The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. Similarly, where a party on whom the onus of proving a certain point lies fails to discharge the onus, he is not entitled to a fresh opportunity to produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. (Vide: Haji Mohammed Ishaq Wd. S. K. Mohammed & Ors. v. Mohamed Iqbal and Mohamed Ali and Co., AIR 1978 SC 798).

Under Order XLI , Rule 27 CPC, the appellate Court has the power to allow a document to be produced and a witness to be examined. But the requirement of the said Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate Court is empowered to admit additional evidence. [Vide: Lala Pancham & Ors. (supra)].

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It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. Hence, in the absence of satisfactory reasons for the non-production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal. (Vide: State of U.P. v. Manbodhan Lal Srivastava, AIR 1957 SC 912; and S. Rajagopal v. C.M. Armugam & Ors., AIR 1969 SC 101).

The inadvertence of the party or his inability to understand the legal issues involved or the wrong advice of a pleader or the negligence of a pleader or that the party did not realise the importance of a document does not constitute a "substantial cause" within the meaning of this rule. The mere fact that certain evidence is important, is not in itself a sufficient ground for admitting that evidence in appeal.

The words "for any other substantial cause" must be read with the word "requires" in the beginning of sentence, so that it is only where, for any other substantial cause, the Appellate Court requires additional evidence, that this rule will apply, e.g., when evidence has been taken by the lower Court so imperfectly that the Appellate Court cannot pass a satisfactory judgment.

Whenever the appellate Court admits additional evidence it should record its reasons for doing so. (Sub-rule 2). It is a salutary provision which operates as a check against a too easy reception of evidence at a late stage of litigation and the statement of reasons may inspire confidence and disarm objection. Another reason of this requirement is that, where a further appeal lies from the decision, the record of reasons will be useful and necessary for the Court of further appeal to see, if the discretion under this rule has been properly exercised by the Court below. The omission to record the reasons must, therefore, be treated as a serious defect. But this provision is only directory and not mandatory, if the reception of such evidence can be justified under the rule.

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The reasons need not be recorded in a separate order provided they are embodied in the judgment of the appellate Court. A mere reference to the peculiar circumstances of the case, or mere statement that the evidence is necessary to pronounce judgment, or that the additional evidence is required to be admitted in the interests of justice, or that there is no reason to reject the prayer for the admission of the additional evidence, is not enough comp1iance with the requirement as to recording of reasons.

It is a settled legal proposition that not only administrative order, but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of order and exercise of judicial power by a judicial forum is for the forum to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound administration of the justice – delivery system, to make it known that there had been proper and due application of mind to the issue before the Court and also as an essential requisite of the principles of natural justice. The reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, the order becomes lifeless. Reasons substitute subjectivity with objectivity. The absence of reasons renders an order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum. Recording of reasons is principle of natural justice and every judicial order must be supported by reasons recorded in writing. It ensures transparency and fairness in decision making. The person who is adversely affected must know why his application has been rejected. (Vide: State of Orissa v. Dhaniram Luhar, AIR 2004 SC 1794; State of Uttaranchal & Anr. v. Sunil Kumar Singh Negi, AIR 2008 SC 2026; The Secretary & Curator, Victoria Memorial Hall v. Howrah Ganatantrik Nagrik Samity & Ors., AIR 2010 SC 1285; and Sant Lal Gupta & Ors. v. Modern Cooperative Group Housing Society Limited & Ors., (2010) 13 SCC 336).

In The Land Acquisition Officer, City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc., AIR 1976 SC 2403, while dealing with the issue, a three judge Bench of this Court held

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as under: “We are of the opinion that the High Court should have recorded its reasons to show why it found the admission of such evidence to be necessary for some substantial reason. And if it found it necessary to admit it an opportunity should have been given to the appellant to rebut any inference arising from its insistence by leading other evidence.” (Emphasis added) A similar view has been reiterated by this Court in Basayya I. Mathad v. Rudrayya S. Mathad and Ors., AIR 2008 SC 1108.

A Constitution Bench of this Court in K. Venkataramiah (Supra), while dealing with the same issue held: “It is very much to be desired that the courts of appeal should not overlook the provisions of cl. (2) of the Rule and should record their reasons for admitting additional evidence..... The omission to record reason must, therefore, be treated as a serious defect. Even so, we are unable to persuade ourselves that this provision is mandatory.” (Emphasis added) In the said case, the court after examining the record of the case came to the conclusion that the appeal was heard for a long time and the application for taking additional evidence on record was filed during the final hearing of the appeal. In such a fact-situation, the order allowing such application did not vitiate for want of reasons.

36. Where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record such application may be allowed.

37. To sum up on the issue, it may be held that application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite condition incorporated in the statutory provisions itself. The discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the

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court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.

An application under Order XLI Rule 27 CPC is to be considered at the time of hearing of appeal on merits so as to find whether the documents and/or the evidence sought to be adduced have any relevance/bearing on the issues involved. The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the Appellate Court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. The true test, therefore is, whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examining the evidence as it stands the court comes to the conclusion that some inherent lacuna or defect becomes apparent to the Court. (Vide: Arjan Singh v. Kartar Singh & Ors., AIR 1951 SC 193; and Natha Singh & Ors. v. The Financial Commissioner, Taxation, Punjab & Ors., AIR 1976 SC 1053).

In Parsotim Thakur & Ors. v. Lal Mohar Thakur & Ors., AIR 1931 PC 143, it was held: ?"The provisions of S.107 as elucidated by O.41, R.27 are clearly not intended to allow a litigant who has been unsuccessful in the lower Court to patch up the weak parts of his case and fill up omissions in the Court of appeal. Under R.27, Cl.(1) (b) it is only where the appellate Court "requires" it (i.e. finds it needful). ..... The legitimate occasion for the exercise of this discretion is not whenever before the appeal is heard a party applies to adduce fresh evidence, but "when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent", it may well be that the defect may be pointed out by a party, or that a party may move the Court to apply the defect, but the requirement must be the requirement of the court upon its appreciation of evidence as it stands. Wherever the Court adopts

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this procedure it is bound by R. 27(2) to record its reasons for so doing, and under R.29 must specify the points to which the evidence is to be confined and record on its proceedings the points so specified. The power so conferred upon the Court by the Code ought to be very sparingly exercised and one requirement at least of any new evidence to be adduced should be that it should have a direct and important bearing on a main issue in the case..." (Emphasis added) (See also: Indirajit Pratab Sahi v. Amar Singh, AIR 1928 P.C. 128)

In Arjan Singh v. Kartar Singh & Ors. (supra), this Court held: ".....If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent..... The order allowing the appellant to call the additional evidence is dated 17.8.1942. The appeal was heard on 24.4.1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the court required to be filled up for pronouncing the judgment" (Emphasis added)

41. Thus, from the above, it is crystal clear that application for taking additional evidence on record at an appellate stage, even if filed during the pendency of the appeal, is to be heard at the time of final hearing of the appeal at a stage when after appreciating the evidence on record, the court reaches the conclusion that additional evidence was required to be taken on record in order to pronounce the judgment or for any other substantial cause. In case, application for taking additional evidence on record has been considered and allowed prior to the hearing of the appeal, the order being a product of total and complete non-application of mind, as to whether such evidence is required to be taken on record to pronounce the judgment or not, remains inconsequential/inexecutable and is liable to be ignored.

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WHAT TRANSPIRED AT THE HEARING, THE RECORD IN THE JUDGMENT OF THE COURT ARE CONCLUSIVE OF THE FACTS SO STATED

It has to be noted that the statement of as to what transpired at the hearing, the record in the judgment of the Court are conclusive of the facts so stated and no one can contradict such statement on affidavit or by other evidence. If a party thinks that the happenings in Court have been erroneously recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges who have made record to make necessary rectification. That is only way to have the record corrected. It is not open to the appellant to contend before this Court to the contrary. (See State of Maharashtra v. Ramdas Shrinivas Nayak and Anr. (1982 (2) SCC 463), Bhavnagar University v. Palitana Sugar Mill (P) Ltd. and Ors. (2003 (2) SCC 111), and Roop Kumar v. Mohan Thedani 2003 (6) SCC 595).

IF A PARTY SAYS WHAT WAS RECORDED WAS ERRONEOUS, THE PARTY SHOULD APPROACH THE CONCERNED COURT FOR MAKING ANY RECTIFICATION 2004 SC

In the decision RAM BALI VS STATE OF U.P. reported in 2004 10 SCC 598, 2004 AIR 2329 the Hon'ble Supreme Court, in paragraph 9 of the said judgment, has held that where the High Court has specifically recorded to the effect that only two points were urged before it, in order to ascertain as to what transpired in the Court, the record in the judgment of the Court should be taken as a conclusive proof and no one should be allowed to contradict such statement on an affidavit or by other evidence. It was further held that if a party wanted to take a stand that what was recorded was erroneous, the party should approach the concerned Court for making any rectification and it is not open to the party to contend contrary to what has been recorded before the Hon'ble Supreme Court.

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APPELLATE COURT MAY PERMIT HIM IN RARE AND APPROPRIATE CASES TO RESILE FROM A CONCESSION WAS MADE ON A WRONG APPRECIATION OF THE LAW AND HAD LED TO GROSS INJUSTICE

In the decision **ROOP KUMAR VS MOHAN THEDANI reported in AIR 1982 SC 1249**, the Hon'ble Supreme Court, while reiterating the said position, however, carved out an exception, which reads as under:-. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

In the decision reported in **AIR 2003 SC 2418**, it was again reiterated in paragraph No.11 that it is not open to a party to turn around and take a plea that no concession was given. which would amount to a case of sitting on the fence, which should not be encouraged. It was again stated that if really there was no concession, the only course open to the party was to move the concerned Court and not by approaching the appellate court.

COURTS SHOULD LEAVE THE DECISIONS ON ACADEMIC MATTERS TO EXPERTS

It is also a well settled principle of law that, courts should leave the decisions on academic matters to experts who are more familiar with the problems faced. In this behalf the Supreme Court while following its earlier decision of the Constitution Bench in University of Mysore and Anr. v. C.D. Govinda Rao and Anr., AIR 1965 SC 491 has held in Tariq Islam v. Aligarh Muslim University & Ors. (2001) 8 SCC 546 that "normally it is wise and safe for the courts to leave the decision of academic matters to experts who are more familiar with the problems they face then the courts generally are". Similar view has been expressed in several decisions in Dr.Uma Kant v. Dr.Bhika Lal Jain, JT 1991 (4) SC 75; Bhushan

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Uttam Khare v. The Dean, B.J. Medical College & Ors., JT 1992 (1) SC 583; Rajender Prasad Mathur v. Karnataka University & Anr., AIR1986 SC 1448; P.M. Bhargava & Ors. v. U.G.C. & Anr., 2004 (6) SCC 661; Chairman, J&K State Board of Education v. Feyaz Ahmed Malik & Ors, (2000) 3 SCC 59; Varanaseya Sanskrit Vishwavidyalaya & Anr. v. Dr. Rajkishore Tripathi & Anr., (1977) 1 SCC 279; Medical Council of India v. Sarang & Ors., (2001) 8 SCC 427; and Bhagwan Singh & Anr. v. State of Punjab & Ors., (1999) 9 SCC 573.

STATEMENTS OR DECLARATIONS BEFORE PERSONS OF COMPETENT KNOWLEDGE MADE ANTE LITEM MOTAM ARE RECEIVABLE TO PROVE ANCIENT RIGHTS OF A PUBLIC OR GENERAL NATURE

In **State of Bihar and Ors. v. Sri Radha Krishna Singh and Ors., 1983 AIR 684**, 1983 SCR (2) 808 the Hon'ble Supreme Court, while considering the scope of provisions of Sections 13 and 41 to 43 of the Act, to prove the admissibility of the earlier judgment, observed as under: It is also well settled that statements or declarations before persons of competent knowledge made ante litem motam are receivable to prove ancient rights of a public or general nature. ..... The admissibility of such declarations is, however, considerably weakened if it pertains not to public rights but to purely private rights. It is equally well settled that declarations or statements made post litem motam would not be admissible because in cases or proceedings taken or declarations made ante litem motam, the element of bias and concoction is eliminated. Before, however, the statements of the nature mentioned above can be admissible as being ante litem motam they must not only be before the actual existence of any controversy, but should be made even before the commencement of legal proceedings. ..... This position however cannot hold good of statements made post litem motam which would be clearly inadmissible in evidence. The reason for this rule seems to be that after a dispute has begun or a legal proceeding is about to

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commence, the possibility of bias, concoction or putting up false pleas cannot be ruled out.

(i) A judgment in rem e.g, judgments or orders passed in admirally, probate proceedings, etc, would always be admissible irrespective of whether they are inter partes or not;

(ii) judgment in personam not inter partes are not at all admissible in evidence except for the three purposes mentioned above.

(iii) on a parity of aforesaid reasoning, the recitals In a judgment like findings given in appreciation of evidence made or arguments or genealogies referred to in the judgment would be wholly in admissible in a case where neither the plaintiffs nor the defendants were parties.

(iv) The probative value of documents which, however ancient they may be, do not disclose sources of their information or have not achieved sufficient notoriety. is precious little.

(v) Statements, declarations or depositions, etc., would not be admissible if they are post litem motam

WHEN FINANCIAL CAPACITY BEING QUESTIONED

In Basalingappa vs. Mudibasappa reported in MANU/SC/0502/2019 : (2019) 5 SCC 418, the Hon'ble Supreme Court has observed that, "When financial capacity being questioned, it is incumbent on the complainant to explain his financial capacity. Court cannot insist on a person to lead negative evidence. The observation of the High Court that trial court's finding that the complainant failed to prove his financial capacity of lending money is perverse, cannot be supported. We fail to see that how the trial court's findings can be termed as perverse by the High Court when it was based on consideration of the evidence, which was led on behalf of the defence."

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N. Shanmugavelu vs. S. Gnanasudhakar and Ors.: MANU/TN/1120/2021 - No doubt, as far as negotiable instrument is concerned, if a pro-note is executed, passing of consideration is presumed. But when the execution itself is denied, the burden to prove the execution and also the capacity to pay the money are on the plaintiff. Several documents were relied by the plaintiff to impress the Court that the signature found in the pro-note is same as the admitted signature found in several other documents. The Trial Court has also compared the signature and accepted the due execution. This is not sufficient when the documents were available for comparing it with the aid of an expert. ..... The scribe, who written the pro-note was not examined and other two witnesses are not independent witnesses but interested witnesses. Once the execution of the document is denied, the plaintiff has to prove its execution.

MOTHER CANNOT ACT AS GUARDIAN UNDER MOHAMMEDAN LAW

Sk. Anwarhussain Abdul Gaffar vs. Yamunabai: MANU/MH/1395/2020 - Paragraph 359 of the book principles of Mohammedan Law by Sir Mulla, the father is stated to be the guardian of the property of the minor. Paragraph 359 reads as under:

"359. Legal guardians of property The following persons are entitled in the order mentioned below to be guardians of the property of a minor-

(1) the father

(2) the executor appointed by the father's will;

(3) the father's father;

(4) the executor appointed by the will of the father's father. "

This would categorically demonstrate that the mother does not fall in any of the categories of guardian of the property of a minor under Mohammedan Law. This position, is clear from the

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dictum of the Hon'ble Apex Court in the case of Mahboob Saheb v. Syed Ismail and others, MANU/SC/0698/1995 : AIR 1995 SC 1205 : (1995 AIR SCW 1956) wherein it has been held in Para 5 as under: "Equally, in Mohammedan Law mother cannot act nor be appointed as property guardian of the minor. She equally cannot act as legal guardian."

13. In light of the above position, the finding by the Trial Court that the agreement dated 03.07.1991, was void and unenforceable in law, due to absence of consent of the defendant No. 2/mother of the defendant No. 1, clearly is unsustainable in law as under Mohammedan Law the mother cannot act or be the guardian of the property of the minor.

14. Further Under Paragraph 362, of the principles of Mohammedan Law by Sir Mulla, **alienation of immovable property by legal guardian is permissible** in the following cases:

"(1) where he can obtain double its value;

(2) where the minor has no other property and the sale is necessary for his maintenance:

(3) where there are debts of the deceased, and no other means of paying them;

(4) where there are legacies to be paid, and no other means of paying them;

(5) where the expenses exceed the income of the property;

(6) where the property is falling into decay; and

(7) when the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution."

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CHAPTER-9

BURDEN AND ONUS OF PROOF

THE BURDEN OF PROOF IS HEAVY ON A PERSON QUESTIONING THE SALE DEED AND CLAIMING THE SAME TO BE NOMINAL

In Vimal Chand Ghevarchand Jain V. Ramakant Eknath Jajoo (2009(2) CTC 858), the Supreme Court had held as follows: The burden of proof is heavy on a person questioning the sale deed and claiming the same to be nominal. He should adduce proper extrinsic evidence to establish his case. A distinction must be borne in mind in regard to the nominal nature of a transaction which is no transaction in the eye of law at all and the nature and character of a transaction as reflected in a deed of conveyance. The deed of sale was a registered one. It, therefore, carries a presumption that the transaction was a genuine one. The pleadings were required to be considered provided any evidence in support thereof had been adduced. No cogent evidence had been adduced by the respondent to show that the deed of sale was a sham transaction and/or the same was executed by way of a security. The deed of sale being a registered one and apparently containing stipulations of transfer of right, title and interest by the vendor in favour of the vendee, the onus of proof was upon the defendant to show that the said deed was, in fact, not executed or otherwise does not reflect the true nature of transaction. Evidently, with a view to avoid confrontation in regard to his signature as an attesting witness as also that of his father as vendor in the said sale deed, he did not examine himself. An adverse inference, thus, should have been drawn against him. When a true character of a document is questioned, extrinsic evidence by way of oral evidence is admissible. Therefore, it was open to the respondent to adduce oral evidence in regard to the nature of the document. The document in question was not only a registered one but also the title deeds in respect of the properties have also been handed over. Symbolical possession if not actual physical possession, thus, must be held to have been handed over. It was acted upon.

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Appellants started paying rent in respect of the said property. No objection thereto has been raised by the respondent. Pleadings of the parties, it is trite, are required to be read as a whole. Defendants, although are entitled to raise alternative and inconsistent plea but should not be permitted to raise pleas which are mutually destructive of each other. It is also a cardinal principle of appreciation of evidence that the court in considering as to whether the deposition of a witness and/or a party is truthful or not may consider his conduct. Equally well settled is the principle of law that an admission made by a party in his pleadings is admissible against him proprio vigore. Therefore, the deed of sale was required to be construed in proper perspective. Indisputably, the deed of sale contained stipulations as regards passing of the consideration, lawful title of the vendor, full description of the vended property, conveyance of the right, title, interest, use, inheritance, property, possession, benefits, claims and demands at law and in equity of the vendor. A document, must be construed in its entirety. Reading the document in question in its entirety, there cannot be any doubt whatsoever that it was a deed of sale. It satisfies all the requirements of a conveyance of sale as envisaged u/s. 54 of the Transfer of Property Act. Right of possession over a property is a facet of title. As soon as a deed of sale is registered, the title passes to the vendee. The vendor, in terms of the stipulations made in the deed of sale, is bound to deliver possession of the property sold. If he does not do so, he makes him liable for damages. The indemnity clause should have been construed keeping in view that legal principle in mind. The stipulation with regard to payment of compensation in the event appellants are dispossessed was by way of an indemnity and did not affect the real nature of transaction. In any event, the said stipulation could not have been read in isolation. Such a case had never been made out and hence cannot be allowed to be raised for the first time before this court. In any event, in view of the conduct of the respondent, he cannot claim equity. An equitable relief can be prayed for by a party who approaches the court with clean hands.

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THE HON'BLE MR. JUSTICE N KUMAR of Karnataka High Court in Sheik Mehamood vs Mohammed Sabder Decided on 25 September, 2012 Strangely, the relinquishment deed is executed in favour of a person who is not a member of the family. The relinquishment deed presupposes antecedent title. If more than one person has the antecedent title to the property, it is open to one person to relinquish his title in favour of the person who is having the antecedent title. The relinquishment deed cannot be in favour of a person who has not title at all. ..... It is compulsorily registrable. It is not registered. Therefore the effect is, no right, title or interest of the executant is transferred to the person in whose favour the property is released. Unfortunately, the trial Court in the first place did not take the trouble of looking into the document. If only it had looked into the document, it would have known that there is no signature of the executant on the said document. Therefore the said document cannot be held against the plaintiffs. It also failed to notice that it is not a registered document. Unless the document is registered, the transfer of right in an immovable property cannot take place. Therefore under the said document there cannot be any transfer of right of Basheer Sab in favour of any person. Strangely, the trial Court relies on Section 90 of the Evidence Act. Section 90 of the Evidence Act states about the presumption as to documents thirty years old. It states that: "90. Presumption as to documents thirty years old- Whether any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that if was duly executed and attested by the persons by whom it purports to be executed and attested." ..... The condition precedent for application of Section 90 is that the said document should bear the signature of the person who is said to have executed the document. If there is no signature at all on the document, Section 90 of the Act is attracted. Section 90 does not have the effect to nullifying the requirement of registration of the document under the Indian Registration Act. If a document is compulsorily registrable and it is not registered and if that document is produced before the Court

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and the if the document is 30 years old, any presumption in so far as registration cannot be drawn. All that Section 90 says is because of lapse of time of 30 years, if a document is produced from a proper custody if that document bears the signature and if attestation is required, it bears attestation, the Court may presume that the document when it was executed was duly executed by the person whose signature is found thereon and if it is a case of proof of attestation, the signature of the attesting witnesses were duly executed. When the document is not executed at all, Section 90 has no application.

Vidhyadhar vs Manikrao & Anr. AIR 1999 SC 1441, 1999 (3) ALT 1 SC, JT 1999 (2) SC 183 The definition indicates that in order to constitute a sale, there must be a transfer of ownership from one person to another, i.e., transfer of all rights and interests in the properties which are possessed by that person are transferred by him to another person. The transferor cannot retain any part of his interest or right in that property or else it would not be a sale. The definition further says that the transfer of ownership has to be for a "price paid or promised or part-paid and part-promised". Price thus constitutes an essential ingredient of the transaction of sale. The words "price paid or promised or part-paid and part-promised" indicate that actual payment of whole of the price at the time of the execution of sale deed is not sine qua non to the completion of the sale. Even if the whole of the price is not paid but the document is executed and thereafter registered, if the property is of the value of more than Rs. 100/-, the sale would be complete. ..... The real test is the intention of the parties. In order to constitute a "sale", the parties must intend to transfer the ownership of the property and they must also intend that the price would be paid either in presenti or in future. The intention is to be gathered from the recital in the sale deed, conduct of the parties and the evidence on record..... The basic principle is that the form of transaction is not the final test and the true test is the intention of the parties in entering into the transaction. If the intention of the parties was that the transfer was by way of security, it would be a mortgage.

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(2007) 13 SUPREME COURT CASES 210 ASOKAN V. LAKSHMIJKUTTY AND OTHERS, certain excerpts from it would run thus: "16. While determining the question as to whether delivery of possession would constitute acceptance of a gift or not, the relationship between the parties plays an important role. It is not a case that the appellant was not aware of the recitals contained in deeds of gift. The very fact that the defendants contend that the donee was to perform certain obligations, is itself indicative of the fact that the parties were aware thereabout. Even a silence may sometimes indicate acceptance. It is not necessary to prove any overt act in respect thereof as an express acceptance is not necessary for completing the transaction of gift.

BURDEN OF PROOF AND ONUS OF PROOF

In R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple and Anr. MANU/SC/0798/2003 : AIR 2003 SC 4548 , the law is stated in the following terms: 29. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in A. Raghavamma v. A. Chenchamma MANU/SC/0250/1963 : [1964]2SCR933 there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title.

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Hon'ble Supreme Court in the case of **Anil Rishi v. Gurbaksh Singh, reported in MANU/SC /8133/2006 : (2006) 5 SCC 558.** Paragraph 19 of the said judgment is quoted herein below: "19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (ii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same."

Patel Ramanbhai Mathurbhai vs. Govindbhai Chhotabhai Patel and Ors.: MANU/GJ/0774/2018 It is one of the fundamental principles of the law of evidence in India that a party on whom burden of proof lies must discharge it by bringing the best evidence available before the Court and where a party does not do so, the Court will be justified in concluding that it would, if brought, not support the case of the party. There is no presumption that an act was done, of which there is no evidence, and the proof of which is essential to the case raised.

The general rule as to the onus of proof and the consequent obligation of beginning is, that the proof of any particular fact lies on the party who alleges it, not on him who denies it, "ei incumbit probatio qui dicit, non qui negat" vide Amir Ali and Woodroffe's Law of Evidence page 603 (Eighth Edition). The reason of the rule is, first that it is but just that he who invokes the aid of the law should be the first to prove his case, and, secondly, that a negative is more difficult to establish than an affirmative. These principles have been clearly laid down in Sections 101 and 103 of the Evidence Act which are as follows: "101. Whoever desires any court

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to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove these facts. .... When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. "103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Supreme Court observed in **MANU/SC/0330/1975 : AIR 1975 SC 1534 [Dr. N.G. Dastane v. Mrs. S. Dastane]** in regard to the standard of proof applicable in a civil case. The relevant passage reads as follows: "24. The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Sec. 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: 'the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue' Per Dixon, J. in Wright v. Wright, (1948) 77 CLR 191 at p. 210; or as said by Lord Denning, 'the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear.

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Blyth v. Blyth, 1966-1 All ER 524 at p. 536.' But whether the issue is one of cruelty or of a loan on a pro-note, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of proof is discharged."

IN A SUIT FOR DISPUTED PROPERTY THE BURDEN TO PROVE TITLE TO THE LAND SQUARELY FALLS ON THE PLAINTIFF

Court in Corporation of City of Bangalore v. Zulekha Bi and Ors. MANU/SC/7346/2008 : (2008) 11 SCC 306, Gurunath Manohar Pavaskar and Ors. v. Nagesh Siddappa Navalgund and Ors. MANU/SC/8191/2007 : (2007) 13 SCC 565 and Anil Rishi v. Gurbaksh Singh MANU/SC/8133/2006 : (2006) 5 SCC 558, wherein it has been specifically held by Court that in a suit for disputed property the burden to prove title to the land squarely falls on the Plaintiff.

THE BURDEN OF PROVING A FACT ALWAYS LIES UPON THE PERSON WHO ASSERTS

Rangammal v. Kuppuswami and another, 2011 (4) R.C.R. (Civil) 251 (Para 14):

Hon'ble the Supreme Court held that the burden of proving a fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. Court cannot proceed on the basis of weakness of the other party. Misplacing burden of proof would vitiate judgment. Para 14 of the judgment reads as under:- "14. Section 101 of the Indian Evidence Act, 1872 defines `burden of proof' which clearly lays down that whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound

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to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party. In view of this legal position of the Evidence Act, it is clear that in the instant matter, when the plaintiff/respondent No.1 pleaded that the disputed property fell into the share of the plaintiff by virtue of the sale deed dated 24.2.1951, then it was clearly for the plaintiff/respondent No.1 to prove that it was executed for legal necessity of the appellant-while she was a minor. But, the High Court clearly took an erroneous view while holding that it is the defendant/appellant who should have challenged the sale deed after attaining majority as she had no reason to do so since the plaintiff /respondent No.1 failed to first of all discharge the burden that the sale deed in fact had been executed for legal necessity of the minor's predecessor mother was without permission of the court. It was not the defendant/respondent who first of all claimed benefit of the sale deed or asserted its genuineness, hence the burden of challenging the sale deed specifically when she had not even been dispossessed from the disputed share, did not arise at all."

PERSONAL KNOWLEDGE OF THE TRANSACTION TO PROVE THE TRANSACTION

Man Kaur (dead) by L.Rs. v. Hartar Singh Sangha MANU/SC/0789/2010 : (2010) 10 SCC 512. Court has held that where the entire transaction has been conducted through a particular agent or representative, the principal has to examine that agent to prove the transaction; and that where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been

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handled by the agent, necessarily the agent alone can give evidence in regard to the transaction. This Court further observed: Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

WHO SHOULD GIVE EVIDENCE IN REGARD TO THE MATTERS INVOLVING PERSONAL KNOWLEDGE

Man Kaur (dead) by LRS. v. Hartar Singh Sangha (2010) 10 SCC 512, court has held that where the entire transaction has been conducted through a particular agent or representative, the principal has to examine that agent to prove the transaction; and that where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by the agent, necessarily the agent alone can give evidence in regard to the transaction. This court further observed: "Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

ORAL AGREEMENT AND BURDEN OF PROOF

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In P.PRABHAKARA RAO vs. P.KRISHNA reported in AIR 2007 AP page 163, the Andhrapradesh High Court held, payment of consideration spread over four years was not acceptable. In case of oral sale agreement the burden is on the plaintiff to prove that there was consensus ad idem between the parties for a concluded oral agreement of sale. The plaintiff did not take any steps on his own accord, in the matter of seeking specific performance of the alleged oral agreement. He swung into action only after he received notice demanding vacant possession. No oral evidence was adduced to speak to the factum of conditions of oral agreement. The plaintiff has failed to prove the existence of consensus ad idem and the oral agreement.

MISPLACED BURDEN OF PROOF VITIATES JUDGEMENT

Hon'ble Supreme Court in the case of Rangammal v. Kuppuswami & Anr., reported in MANU/SC /0620 /2011 : 2011 (4) JCR 37 (SC). Paragraphs 20 to 23 of the said judgment are quoted herein below: "20. Since the High Court has misplaced burden of proof, it clearly vitiated its own judgments as also of the courts below since it is well established dictum of the Evidence Act that misplacing burden of proof would vitiate judgment. It is also equally and undoubtedly true that the burden of proof may not be of much consequence after both the parties lay evidence, but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and recording findings in a particular way definitely vitiates the judgment as it has happened in the instant matter. This position stands reinforced by several authorities including the one delivered in the case of Koppula Koteshwara Rao vs. Koppula Hemant Rao, 2002 AIHC 4950 (AP).

21. It has been further held by the Supreme Court in the case of State of J & K vs. Hindustan Forest Company, 2006 (12) SCC 198, wherein it was held that the onus is on the plaintiff to positively establish its case on the basis of material available and it cannot rely on the weakness or absence of defence to discharge onus.

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22. It was still further held by this Court in the matter of Corporation of City of Bangalore vs. Zulekha Bi, MANU/SC/7346/2008 : 2008 (11) SCC 306 (308) that it is for the plaintiff to prove his title to the property. This ratio can clearly be made applicable to the facts of this case for it is the plaintiff who claimed title to the property which was a subject-matter of the alleged sale deed of 24.2.1951 for which he had sought partition against his brother and, therefore, it was clearly the plaintiff who should have first of all established his case establishing title of the property to the joint family out of which he was claiming his share. When the plaintiff himself failed to discharge the burden to prove that the sale deed which he executed in favour of his own son and nephew by selling the property of a minor of whom he claimed to be legal guardian without permission of the court, it was clearly fit to be set aside by the High Court which the High Court as also the courts below have miserably failed to discharge. The onus was clearly on the plaintiff to positively establish his case on the basis of material available and could not have been allowed by the High Court to rely on the weakness or absence of defence of the defendant/appellant herein to discharge such onus.

23. The courts below thus have illegally and erroneously failed not to cast this burden on the plaintiff/respondent No. 1 by clearly misconstruing the whole case and thus resulted into recording of findings which are wholly perverse and even against the admitted case of the parties."

EVIDENCE ON PLEA RAISED

The Hon'ble Supreme Court In Om Prabha v. Abnash Chand, AIR 1968 SC 1083, has observed that the ordinary rule of law is that evidence should be given only on plea properly raised and not in contradiction of the plea.

Devi Shankar vs Ugam Raj AIR 2002 Raj 330 The rule of secundum allegata et probata Is based mainly on the principle that no party should be taken by surprise by the change of case

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introduced by the opposite party. Therefore, the test, when an objection of this kind is taken, is to see whether the party aggrieved has really been taken by surprise, or is prejudiced by the action of the opposite party. In applying this test the whole of the circumstances must be taken into account and carefully scrutinised to find out whether there has been such surprise or prejudice as will disentitle a party to relief. Every variance, therefore, between pleading and proof is not necessarily fatal to the suit or defence and the rule of secundum allegata et probata will not be strictly applied where there could be no surprise and the opposite party is not prejudiced thereby. A variation which causes surprise and confusion is always looked upon with considerable disfavour. But, where a ground though not raised in the pleadings in expressly put in issue or where the new claim set up is not inconsistent with the allegations made in the pleadings and is based on facts alleged therein, there is no question of surprise to the opposite party. So also. where although there was no specific plea or specific issue on a particular question, the parties have gone to trial with the full knowledge that the question was in issue and adduced evidence, there can be no prejudice. Whether a plea has been raised may be gathered from the pleadings taken as a whole, and if a sufficient plea is disclosed and the parties have led evidence on the point the Court can give relief on such plea.

In Firm Sriniwas Ram Kumar v. Mahabir Prasad, AIR 1951 SC 177, the Hon'ble Supreme Court has held as under:-- "A plaintiff may rely upon different rights alternatively and there is nothing in the CPC to prevent a party from making two or more inconsistent acts of allegations and claiming relief thereunder in the alternative. Ordinarily, the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made In the suit. there would be nothing Improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's

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own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit."

The Hon'ble Supreme Court in Trojan & Co. Ltd. v. Nagappa Chettiar, AIR 1953 SC 235 has held as under :-- The decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment in the plaint the Court held was not entitled to grant the relief not asked for."

In Bhagwati Prasad v. Chandramaul, AIR 1966 SC 735, the Hon'ble Supreme Court, after analysing the law laid down in the case of Trojan & Co. Ltd. v. Nagappa Chettiar (supra), has further stated that it a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved In the trial, then the mere fact that the plea was not expressly taken in the pleadings would not disentitle a party from relying upon it if it is satisfactorily proved by evidence. What the Court has to consider in dealing with such an objection is did the parties know that the matter in question was involved in the trial and did they lead evidence about it? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. But, if the parties led evidence knowing what they are going to allege and prove, then in such case general rule would not be applicable and the case would be covered by an issue by implication that though the matter has not been specifically pleaded, yet it is implied in the pleadings of the parties.

In Ram Sarup Gupta (dead) by L.Rs. v. Bishun Narain Inter College, AIR 1987 SC 1242, the Hon'ble Supreme Court has held

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that it is not desirable to place undue emphasise on form. Instead substance of pleadings should be considered.

The Hon'ble Supreme Court in Bhim Singh v. Ran Singh. AIR 1980 SC 727 has held that if a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expresly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactory proved by the evidence.

In Kali Prasad v. Bharat Coking Coal Ltd. AIR 1989 SC 1530, it has been held by the Hon'ble Supreme Court that where the parties went to trial knowing fully well what they were required to prove and they had adduced evidence of their choice in support of the respective claims and that evidence was considered by both courts below, they could not be allowed to turn round and say that the evidence should not be looked into.

National Textile Corporation Limited vs. Naresh Kumar Badrikumar Jagad and Ors., (2011) 12 SCC 695, the Supreme Court held as hereunder: "12. Pleadings and particulars are necessary to enable the court to decide the rights of the parties in the trial. Therefore, the pleadings are more of help to the court in narrowing the controversy involved and to inform the parties concerned to the question in issue, so that the parties may adduce appropriate evidence on the said issue. It is a settled legal proposition that "as a rule relief not founded on the pleadings should not be granted". A decision of a case cannot be based on grounds outside the pleadings of the parties. The pleadings and issues are to ascertain the real dispute between the parties to narrow the area of conflict and to see just where the two sides differ. (Vide Trojan & Co. v. Nagappa Chettiar [AIR 1953 SC 235] , State of Maharashtra v. Hindustan Construction Co. Ltd. [(2010) 4 SCC 518 : (2010) 2 SCC (Civ) 207 : AIR 2010 SC 1299] and

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Kalyan Singh Chouhan v. C.P. Joshi [(2011) 11 SCC 786 : (2011) 4 SCC (Civ) 656 : AIR 2011 SC 1127] .)

In J. Jermons v. Aliammal [(1999) 7 SCC 382] while dealing with a similar issue, this Court held as under: (SCC p. 398, paras 31-32) "31. ... there is a fundamental difference between a case of raising additional ground based on the pleadings and the material available on record and a case of taking a new plea not borne out by the pleadings. In the former case no amendment of pleadings is required whereas in the latter it is necessary to amend the pleadings. ... 32. ... The respondents cannot be permitted to make out a new case by seeking permission to raise additional grounds in revision."

BALD STATEMENT OF WITNESS IS NOT ENOUGH TO PROVE PROPERTY AS ANECSTRAL PROPERTY

Anjana Rahi vs. Subhash Chander: MANU/PH/0471/2020

28. It may be noted here that the plaintiff while filing the suit has failed to explain how the suit property is Ancestral Coparcenary and Undivided Joint Hindu Family property. The plaintiff has examined as many as 7 witnesses including himself but none of the witness has explained or stated that how the suit property is Joint Hindu Family Ancestral Coparcenary property. Learned first appellate court has noticed this fact in its judgment. However, the learned first appellate court has held that since the witnesses have made a statement that the suit property is ancestral and the aforesaid statement has not been challenged in the cross-examination of the aforesaid witnesses, hence, the property is proved to be ancestral property.

29. Whether the property is ancestral or not is a question of fact? It is for the Court to determine as to whether a particular property is ancestral or not. For determination of that question, it is necessary to lead evidence. The courts cannot be expected to depend upon the bald statements of the witnesses to the fact that

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the property is ancestral. What would be ancestral property has been explained in paragraph 221 of 23rd Edition of Mula's Hindu Law in following manner:-

Ancestral property.--(1) Property inherited from paternal ancestor. - All property inherited by a male Hindu from his father, father's father or father's father's father, is ancestral property. The essential feature of ancestral property according to Mitakshara law is that the sons, grandsons, and great-grandsons of the person who inherits it, acquire an interest, and the rights attached to such property at the moment of their birth. Thus, if A inherits property, whether movable or immovable, from his father of father's father, or father's father's father, it is ancestral property, as regards his male issue. If A has no son, son's son, or son's son's son in existence at the time when he inherits the property, he holds the property as absolute owner thereof, and he can deal with it as he pleases. However, if he has son's, son's sons or sons' sons' sons in existence at the time, of if a son, son's son or son's son's son is born to him subsequently, they become entitled to an interest in it by the mere fact of heir birth in the family and A cannot claim to hold the property as absolute owner nor can he deal with the property as he likes. The position has been materially affected after section 8 of The Hindu Succession Act, 1956, came into force.

A father cannot change the character of the joint family property into absolute property of his son by merely marking a will and bequeathing it or part of it to the son as if it was the self acquired property of the father. In the hands of the son, the property will be ancestral property and the natural or adopted son of that son will take interest in it and be entitled to it by survivorship, as joint family property. However, an affectionate gift of his self acquired property by a father is not ipso facto ancestral property in the hands of the son.

A person inheriting property from his three immediate paternal ancestors holds it, and must hold it, in coparcenary with his sons, son's son and son's son's sons, but as regards other relations, he holds it, and is entitled to hold it as his absolute property. The result is that if a person inheriting property from another one of his three immediate paternal ancestors has no son, son's son, or son's son's son, the property is his absolute property,

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and no relations of his are entitled to any interest in it in his lifetime.

Property inherited by a Hindu male from his father, father's father, or father's father's father, is ancestral as regards his male issue, even though it was inherited by him after the death of a life-tenant. Thus, if a Hindu settles the income of his property on his wife for her life, and the property after her death passes to his son as his heir, it is ancestral property in the hands of the son as regards the male issue of such son."

30. In these circumstances, it was required to be proved by the plaintiff that the property was inherited by a male Hindu from his father, father's father, father's father's father. ..... The onus to prove that the suit property is ancestral was on the plaintiff. Since, the plaintiff has failed to discharge its onus, therefore, learned first appellate court has erred. It may be noted here that in absence of positive evidence in examination-in-Chief, failure of the defendant to cross-examine the witnesses produced by the plaintiff on a particular aspect cannot be conclusive to hold that the property is ancestral.

Hon'ble Supreme Court in **D.S. Lakshmaiah & Anr. vs. L. Balasubramanyam & Anr. MANU/SC /0639/2003 : (2003) 10 SCC, 310.** It was held that the property cannot be presumed to be Joint Hindu Family property merely because of existence of Joint Hindu Family. The burden to prove that the property is Joint Hindu Family property lies on the person, who asserts so. Relevant discussion in the aforesaid judgment is in paragraph 18, which is extracted as under:- "The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.

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MODE OF PROOF OF WILL

The Supreme Court in the case of **S.R. Srinivasa v. S. Padmavathamma, reported in MANU/SC/ 0285/2010 : (2010) 5 SCC 274**, has held as under:

38. In H. Venkatachala Iyengar v. B.N. Thimmajamma, Gajendragadkar, J. stated the true legal position in the matter of proof of wills. The aforesaid statement of law was further clarified by Chandrachud, J. in Jaswant Kaur v. Amrit Kaur as follows: (SCC pp. 373-74, para 10)

"1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of

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property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion, etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter." .....

..... In such circumstances, the observations made by this Court in M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons become relevant. Considering the question as to whether a scribe could also be an attesting witness, it is observed as follows: (SCC p. 577, para 7) "7. ... It is essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his

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signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

Supreme Court in the case of H. Venkatachala Iyengar v. B.N. Thimmajamma, reported in MANU/SC/0115/1958 : 1959 Supp (1) SCR 426, has held as under:

18. What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the

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last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and

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evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

19. **In Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao this Court held: MANU/SC/8788/2006 : (2006) 13 SCC 433** "32. Section 63 of the Succession Act lays down the mode and manner of execution of an unprivileged will. Section 68 of the Evidence Act postulates the mode and manner of which proof of execution of document which is required by law to be attested. It in unequivocal terms states that execution of will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an

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animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

33. The burden of proof that the will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. (See Madhukar D. Shende v. Tarabai Aba Shedage and Sridevi v. Jayaraja Shetty.) Subject to above, proof of a will does not ordinarily differ from that of proving any other document."

20. Therein, this Court also took into consideration the decision of this Court in H. Venkatachala Iyengar, wherein the following circumstances were held to be relevant for determination of the existence of the suspicious circumstances: **(Mrudula Jyoti Rao case, MANU/SC/8788/2006 : (2006) 13 SCC 433**)

"34. ... (i) when a doubt is created in regard to the condition of mind of the testator despite his signature on the will;

(ii) when the disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances;

(iii) where propounder himself takes prominent part in the execution of will which confers on him substantial benefit."

Supreme Court in the case of **Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao, reported in MANU/SC/8788/2006 : (2006) 13 SCC 433**, has held as under:

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32. Section 63 of the Succession Act lays down the mode and manner of execution of an unprivileged will. Section 68 of the Evidence Act postulates the mode and manner of proof of execution of document which is required by law to be attested. It in unequivocal terms states that execution of will must be proved at least by one attesting witness, if an attesting witness is alive subject to the process of the court and capable of giving evidence. A will is to prove what is loosely called as primary evidence, except where proof is permitted by leading secondary evidence. Unlike other documents, proof of execution of any other document under the Act would not be sufficient as in terms of Section 68 of the Evidence Act, execution must be proved at least by one of the attesting witnesses. While making attestation, there must be an animus attestandi, on the part of the attesting witness, meaning thereby, he must intend to attest and extrinsic evidence on this point is receivable.

33. The burden of proof that the will has been validly executed and is a genuine document is on the propounder. The propounder is also required to prove that the testator has signed the will and that he had put his signature out of his own free will having a sound disposition of mind and understood the nature and effect thereof. If sufficient evidence in this behalf is brought on record, the onus of the propounder may be held to have been discharged. But, the onus would be on the applicant to remove the suspicion by leading sufficient and cogent evidence if there exists any. In the case of proof of will, a signature of a testator alone would not prove the execution thereof, if his mind may appear to be very feeble and debilitated. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. (See Madhukar D. Shende v. Tarabai Aba Shedage and Sridevi v. Jayaraja Shetty.) Subject to above, proof of a will does not ordinarily differ from that of proving any other document.

Srinivas Murthy B.V. vs. B.S. Venkatachala Setty and Ors.: MANU/KA/1985/2020

Janki Narayana Bhoir V/s. Narayan Namdeo Kadam reported in MANU/SC/1155/2002 : (2003) 2 SCC 91 has held that

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Section 68 of the Indian Evidence Act necessitates that a document which is required by law to be attested shall not be used as a evidence, until and unless, atleast one attesting witness to that document has been called in evidence for the purpose of proving its execution. Thus, according to the mandate of Section 68 of the Indian Evidence Act, if there being a attesting witness to a document, alive and are capable of giving evidence, then that attesting witness subject to the process of Court has to be necessarily examined before the document required by law to be attested can be used as evidence. In the instant case, since the attestors to the Will are dead and their children are examined as DW3 and DW4 by defendant and as such, the identification of the signatures of attestors having been proved as required under law, the defendant being the propounder of the Will has removed all legitimate suspicion raised by the plaintiff and therefore, defendant No. 2 has proved initially the onus of proof as required under law by examining the scribe DW2, DW3 and DW4 and as such, I do not find any reason to interfere with the judgment and decree passed by the trial Court.

Supreme Court in the case of **H. VENKATACHALA IYENGAR VS. B.N. THIMMAJAMMA & OTHERS reported in MANU/SC/0115/1958 : AIR 1959 SC 443** Paragraph 18 of the said judgment reads as under: "What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required

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by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the, prudent mind in such matters."

In Sridevi and others v. Jayaraja Shetty and others, MANU/SC/0065/2005 : 2005 (2) SCC 784, the Apex Court was pleased to hold that the onus to establish allegations of undue influence, fraud or coercion lies on the persons making such allegation. Following are the relevant passages:

"15. Coming to the suspicious circumstances surrounding the Will, it may be stated that although the Testator was 80 years of

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age at the time of the execution of the Will and he died after 15 days of the execution of the Will, the two Attesting Witnesses and the scribe have categorically stated that the Testator was in sound state of health and possessed his full physical and mental faculties. Except that the deceased is 80 years of age and that he died within 15 days of the execution of the Will, nothing has been brought on record to show that the Testator was not in good health or possessed of his physical or mental faculties. From the cross-examination of the Scribe and the two Attesting Witnesses, the Appellants have failed to bring out anything which could have put a doubt regarding the physical or mental incapacity of the Testator to execute the Will. Submission of the learned Counsel for the Appellants that the Testator had deprived the other heirs of his property is not true. The family properties had been partitioned in the year 1961. The shares which were given to Dharmaraja Kadamba and Raviraja Kadamba were in possession of Tenants and vested in the State Government after coming into force of Karnataka Land Reforms (Amendment) Act, 1973 whereas the properties which had been given to the daughters were in the personal cultivation of the family. The Testator while executing the will bequeathed the properties which had fallen to his share in the partition and which he had inherited from his brother which were in his personal cultivation in favour of his two sons Dharmaraja Kadamba and Raviraja Kadamba and gave the right to receive compensation to other heirs of the properties, which were under the Tenants and had vested in the State Government. It is not a case where the father had deprived his other children totally from inheritance. Reasons for unequal distribution have been given in the Will itself. This had been done by him to balance the equitable distribution of the properties in favour of all his children.

16. Counsel for the Appellants argued that Respondent No. 13 had taken prominent part in the execution of the Will as he was present in the house at the time of the alleged execution of the Will. We do not find any merit in this submission. Apart from establishing his presence in the house, no regarding the execution of the Will. Mere presence in the house would not prove that he had taken prominent part in the execution of the will. Moreover, both the attesting Witnesses have also stated that the daughters were also

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present in the house at the time of execution of the Will. The attesting Witnesses were not questioned regarding the presence of the daughters at the time of the execution of the Will in the cross-examination. The presence of the daughters in the house at the time of execution of the Will itself dispels any doubt about the so-called role which Respondent No. 13 had played in the execution of the Will. They have not even stepped into the Witness box to say as to what sort of role was played by Respondent No. 13 in the execution of the Will."

In Savithri and others v. Karthyayani Amma and others, MANU/SC/8061/2007 : 2007 (11) SCC 621, the Supreme Court has held that the fact that the Testator lived for long number of years after the due execution is to be borne in mind while testing the genuinity of the Will. The relevant Paragraph is as follows: "The Will was admittedly registered. The Testator lived for seven years after execution of the Will. He could change his mind; he did not. The very fact that he did not take any step for cancellation of the Will is itself a factor which the Court may take into consideration for the purpose of upholding the same. The question as to whether the Register was brought to the house of the Propounder or he had gone to the Registrars office is not a matter which requires serious consideration."

Supreme Court in Bharpur Singh and others v. Shamsher Singh, MANU/SC/8404/2008 : 2009 SCC 687.

"23. Suspicious circumstances like the following may be found to be surrounded in the execution of the Will:

(i) The signature of the Testator may be very shaky and doubtful or not appear to be his usual signature.

(ii) The condition of the Testator's mind may be very feeble and debilitated at the relevant time.

(iii) The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.

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(iv) The dispositions may not appear to be the result of the Testator's free will and mind.

(v) The Propounder takes a prominent part in the execution of the Will.

(vi) The Testator used to sign blank papers.

(vii) The Will did not see the light of the day for long.

(viii) Incorrect recitals of essential facts.

24. The circumstances narrated hereinbefore are not exhaustive. Subject to offer of reasonable explanation, existence thereof must be taken into consideration for the purpose of arriving at a finding as to whether the execution of the Will had duly been proved or not. It may be true that the Will was a registered one, but the same by itself would not mean that the Statutory requirements of proving the Will need not be complied with."

In Guro (Smt) vs. Atma Singh and Ors. MANU/SC /0492/1992 : (1992) 2 SCC 507, Supreme Court noticed and summarized certain suspicious circumstances which are as follows;

"(1) The will mentioned that the testator had been ill for a long time and was seriously ill at the time of execution of the will.

(2) The testator stated that he did not have any sister, which was not correct.

(3) The respondent, the sole legatee, had been wrongly described as the real brother of the testator.

(4) No reasons were mentioned in the will why the appellant, who was the natural heir of the testator, was being ignored.

(5) Although the testator was literate, the will bore his thumb impression.

(6) The will was an unregistered document not scribed by a regular deed writer and as such could be prepared at any time.

(7) Within eight days of the execution of the will the testator died. The appellate court also found that contradictory statements had

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been made by the respondent with regard to his presence at the time of execution of the will, by the scribe as well as by K. The appellate court, therefore, reversed the decree of the trial court and dismissed the suit of the respondent. But the High Court allowed the second appeal filed by the respondent and restored the judgment and decree of the trial court on the view that the will had been validly executed."

Guro vs. Atma Singh and Ors. : MANU/SC/ 0492/1992 - With regard to proof of a will, the law is well-settled that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement prescribed in the case of a will by Section 63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and signature of the testator as required by law is sufficient to discharge the onus. Where, however there were suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before the will could be accepted as genuine. Such suspicious circumstances may be a shaky signature, a feeble mind and unfair and unjust disposal of property or the propounder himself taking a leader part in the making of the will under which he receives a substantial benefit. The presence of suspicious circumstances makes the initial onus heavier and the propounder must remove all legitimate suspicion before the document can be accepted as the last will of the testator.

N. Kamalam (Dead) and another v. Ayyasamy and another MANU/SC/0422/2001 : (2001) 7 SCC 503 held that the effect of subscribing a signature on the part of the scribe cannot be identified to be of the same status as that of attesting witnesses and observed as under:-

"26. The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of same status as that of the attesting witnesses. The signature of the attesting witness as noticed above on a document, requiring attestation (admittedly in

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the case of a will the same is required), is a requirement of the statute, thus cannot be equated with that of the scribe.

27. ... The animus to attest, thus, is not available, so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will. The statutory requirement as noticed above cannot thus be transposed in favour of the writer, rather goes against the propounder since both the witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the court so as to satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due attestation unless the situation is so expressed in the document itself -- this is again, however, not the situation existing presently in the matter under consideration. Some grievance was made before this Court that sufficient opportunity was not being made available, we are however, unable to record our concurrence therewith. No attempt whatsoever has been made to bring the attesting witnesses who are obviously available.

32. While it is true that Arunachalam, in the facts of the matter under consideration, did write the will and has also signed it but it is of utmost requirement that the document ought to be signed by the witnesses in order to have the statutory requirement fulfilled. Arunachalam has signed the document as a scribe not as a witness, if there were no signatures available as witness, probably we would have to specifically deal with such a situation and consider that aspect of the matter but presently in the fact situation of the matter under consideration, we have the advantage of two attesting witnesses, none of whom have been examined and the factum of their non-availability also has not satisfactorily been proved. The evidence of one person, namely, Arunachalam, cannot displace the requirement of the statute when Arunachalam himself has specifically identified himself as writer and not as a witness though in his evidence, he tried to improve the situation, but this improvement, however, cannot (sic) said to be accepted: the will thus fails to have its full impact and its effect stands out to be non est."

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The Supreme Court in the matter of S.R. Srinivasa & Ors. v. S. Padmavathamma MANU/SC/0285 /2010 : 2010 AIR SCW 3935 following the principle of law laid down in N. Kamalam (supra) has held that none of the attesting witnesses were examined and scribe has not stated that he had signed Will with intention to attest and merely stated that he was scribe of Will. Thus mere signature of scribe cannot be taken as proof of attestation.

The Supreme Court in the matter of **Dharam Singh v. Aso and another MANU/SC/0327/1990 : AIR 1990 SC 1888** has held that (Registering Authority (Registrar) cannot be a statutory attesting witness.

Lalitha Mohan and Ors. vs. Pratap K. Moturi: MANU/TN/3030/2020 - The Will has to be proved in accordance with Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872. There is no substantial difference between a Registered and Unregistered Will insofar as the above compliance of the provisions is concerned. However, registration gives additional strength to the Propounder or beneficiary. Section 114(e) of the Indian Evidence Act, 1872, read with Section 60 of the Registration Act do create a presumption. Such a presumption is attributable to the official act of registration. When a fraud is alleged, it is for the person making such an allegation to substantiate it. This onus cannot be confused with the mandatory requirement to prove the Will, which is always on the Propounder of the Will or the beneficiary. The Testamentary Court is not a Court of suspicion but of conscience. The question as to whether the Testator was in a sound and disposing state of mind is one of the fact. When suspicious circumstance is found to be in existence, the onus is with the Propounder to disprove it.

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MODE OF PROOF OF GIFT

Om Prakash (died) v. Santhi Devi and others, MANU/SC/0002/2015 : AIR 2015 SC 976. Relevant observations in given facts and circumstances are in Paras 8 and 9 of this ruling, which are extracted hereunder:

"(8) Section 68 prescribes that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness atleast has been called for the purpose of proving its execution. Section 123 of the Transfer of Property Act, 1882 mandates that a Gift Deed pertaining to immovable property must be effected by a registered instrument signed by or on behalf of the donor and attested by atleast two witnesses.----------

(9) .....Section 69 provides for "proof where no attesting witness found". It is at once apparent that this provision anticipates a reasonable anxiety emerging out of the peremptoriness of Section 68, in that it addresses, inter alia, a situation where none of the attesting witnesses to a document (a gift deed in this case) are alive at the time of the curial investigation thereof. Not leaving litigants forlorn for proof under Section 68, Section 69 places emphasis of handwriting(s) of the putative deceased or the 'not found' attestator(s), alongwith the signatures of the executants. We must be quick to elucidate that the position is akin to the reception of secondary evidence, in that the successful passage from the rigours of Section 68 can be met contingent upon the proved non-availability of the attesting witnesses to a document. Litigants are, therefore, not faced with an evidentiary cul-de-sac. They can discharge their burden by proving, in the alternate mode and manners conceived by the Act, the signatures of the putative attestators alongwith the handwriting of the executants".

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STANDARD OF PROOF IN CIVIL CASES

Gulabchand vs. Seth Kudilal and Ors. MANU/SC /0064/1966

In s. 3 of the Indian Evidence Act, the words "proved", "disproved" and "not proved" and defined as follows :

"Proved. - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so portable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

"Disproved. - A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it dose not exist."

"Not proved. - A fact is said not to be proved when it is neither proved nor disproved."

13. It is apparent from the above definitions that the Indian Evidence Act applies the same standard of proof in all civil cases. It makes no difference between cases in which charges of fraudulent or criminal character are made and cases in which such charges are not made. But this is not to say that the Court will not, while striking the balance of probability, keep in mind the presumption of honesty or innocence or the nature of the crime or fraud charged.

WHEN RECEIVER APPOINTED BY COURTS

Flywheel Logistics Solutions Pvt. Ltd. vs. Hinduja Leyland Finance Ltd. and Ors. : MANU/TN/ 5417/2020

i. The decision of the Supreme Court in Adhunik Steels has settled the law that the appointment of a Receiver in exercise of powers under Section 9 of the Act can be done only if the case is brought within the accepted principles under the Code. This is clear from

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the following observations of the Apex Court. "The grant of an interim prohibitory injunction or an interim mandatory injunction are governed by well-known rules and it is difficult to imagine that the legislature while enacting Section 9 of the Act intended to make a provision which was dehors the accepted principles that governed the grant of an interim injunction. Same is the position regarding the appointment of a receiver since the section itself brings in the concept of "just and convenient" while speaking of passing any interim measure of protection."

ii. Under the Code, Courts possess powers to appoint Receivers if it finds it just and convenient to do so. The expression "just and convenient" though of wide amplitude require the Court to exercise caution and circumspection as the appointment of the Receiver is a drastic remedy. Hence, the Courts have insisted that the applicant must establish a heightened threshold of "an excellent chance of success" as distinguished from a mere "prima facie case" under Order XXXIX. It is for the applicant to plead and establish this exacting requirement, and a Receiver will not be appointed on the mere ipse dixit of the applicant or on the basis of bald and unsubstantiated averments.

iii.**In Three Cheers Entertainment (P) Ltd. v. CESC Ltd., MANU/SC/8152/2008 : (2008) 16 SCC 592**, the Supreme Court has also strongly deprecated the practice of passing ex-parte orders appointing Receivers and the Apex Court has observed thus: "22. We fail to understand as to on what basis, the Joint Receivers were appointed. No prayer was made therefor on the said date. No application was filed. The matter was placed before the learned Single Judge only for confirmation of the ad interim order passed and not for deciding on Prayer (c) concerned. A bare perusal of the said order would clearly indicate that even a prima facie finding had not been arrived at warranting appointment of Receiver. No reason has been assigned in support thereof. No jurisdictional fact that it was just and proper to appoint a Receiver as is required under Order 40 Rule 1 of the Code of Civil Procedure was recorded far less why the same was found to be necessary and

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emergent. In any event, a show-cause notice at the first instance should have been issued."

iv.**In T. Krishnaswamy Chetty v. C. Thangavelu Chetty, MANU/TN/0176/1955 : AIR 1955 Mad 430,** Hon'ble Court formulated five principles which it termed as "panchsadachar" which were to guide the Courts in exercise of jurisdiction to appoint Receivers. This decision has been quoted with approval by several High Courts, and is, therefore, a locus classicus on the powers of the Court to appoint a Receiver under the Code. The principles laid down are as under: "17. The five principles which can be described as the 'panchsadachar' of our Courts exercising equity jurisdiction in appointing receivers are as follows:

(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding.

(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie; he has very excellent chance of succeeding in the suit.

(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm.

(4) An order appointing a receiver will not be made where it has the effect of depriving a defendant of a 'de facto' possession since that

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might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through fraud or force the Court will interpose by receiver for the security of the property. It would be different where the property is shown to be 'in medio', that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver. Otherwise a receiver should not be appointed in supersession of a bone fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred.

(5) The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc."

v.**In Parmanand Patel v. Sudha A. Chowgule, MANU/SC/0377/2009 : (2009) 11 SCC 127**, the Supreme Court broadly restated these principles in the following passage: "23. A Receiver, having regard to the provisions contained in Order 40 Rule 1 of the Code of Civil Procedure, is appointed only when it is found to be just and convenient to do so. Appointment of a Receiver pending suit is a matter which is within the discretionary jurisdiction of the Court. Ordinarily the Court would not appoint a Receiver save and except on a prima facie finding that the plaintiff has an excellent chance of success in the suit. .... 24. It is also for the plaintiff not only to show a case of adverse and conflict claims of property but also emergency, danger or loss demanding immediate action. Element of danger is an important consideration. Ordinarily, a Receiver would not be appointed

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unless a case has been made out which may deprive the defendant of a de facto possession. For the said purpose, conduct of the parties would also be relevant."

vi.**Supreme Court in Dev Prakash v. Indra MANU/SC/0779/2017 : (2018) 14 SCC 292,** held, in the context of appointment of a Receiver for immovable property, that the very purpose of a temporary injunction and receivership is to protect the property from acts of waste, damage and alienation during the pendency of the suit. The Supreme Court set aside the order directing sale of the property through public auction and observed thus: "The direction for disposal of the suit property by public auction, in the facts and circumstances of the case, clearly militates against the fundamental precept of preservation of subject-matter of any dispute pending adjudication in a court of law, more particularly relatable to a civil litigation, to appropriately decide on the rights of the parties for administering the reliefs to which they would be entitled eventually on the culmination of the adjudication. As it is, the very essence of the concept of temporary injunction and receivership during the pendency of a civil litigation involving any property is to prevent its threatened wastage, damage and alienation by any party thereto, to the immeasurable prejudice to the other side or to render the situation irreversible not only to impact upon the ultimate decision but also to render the relief granted, illusory. We do not wish to burden this order by the decisions of this Court on the issue except referring to the one in Maharwal Khewaji Trust v. Baldev Dass [Maharwal Khewaji Trust v. Baldev Dass, MANU/SC/0912/2004 : (2004) 8 SCC 488 : AIR 2005 SC 104], wherein it has been underlined that unless and until a case of irreparable loss or damage is made out by a party to the suit, the court should not permit the nature of the property to be changed, which may include alienation or transfer thereof leading to loss or damage been caused to the party who may ultimately succeed and which would as well lead to multiplicity of proceedings."

These are the broad substantive principles that must govern the appointment of a Receiver either before the Court under Section 9 or under Section 17 of the Act before the Tribunal.

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SEIZURE OF VEHICLES

Flywheel Logistics Solutions Pvt. Ltd. vs. Hinduja Leyland Finance Ltd. and Ors. : MANU/TN/ 5417/2020

i. The Tribunal or the Court is very often approached by finance companies and banks for interim measures to seize and secure the vehicles lent to hirers under a hire purchase/hypothecation agreement. The power to re-possess the vehicle for defaults in payment of instalments by the borrowers is a creature of the contract. Though it is well settled that finance companies/banks can exercise this contractual power to re-possess the asset [Harita Finance Limited v. ATV Projects India Limited, MANU/TN/0493/2003 : 2003 2 LW 179], the exercise of this power can be only in a manner known to law.

ii. The Supreme Court has, in no uncertain terms, condemned the use of hirelings to recover possession of the vehicle without recourse to the remedies available in law. Thus, in ICICI Bank Ltd. v. Prakash Kaur, MANU/SC/0962/2007 : (2007) 2 SCC 711, it has been observed as under: "16. Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are musclemen, is deprecated and needs to be discouraged. The Bank should resort to procedure recognised by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong-arm tactics."

iii. In Citicorp Maruti Finance Ltd. v. S. Vijayalaxmi, MANU/SC/1337/2011 : (2012) 1 SCC 1, a three judge bench of the Supreme Court reiterated its earlier decision in Prakash Kaur, and observed as under "27. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicle by use of force. The guidelines which had been laid down by

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Reserve Bank of India as well as the appellant Bank itself, in fact, support and make a virtue of such conduct. If any action is taken for recovery in violation of such guidelines or the principles as laid down by this Court, such an action cannot but be struck down."

iv. In L & T Finance Ltd. v. G.G. Granites, MANU/TN/2662/2013 : (2013) 5 LW 714, traced the power to seize and possess a hypothecated property to Section 9(ii)(a) &(c) of the Act. Post the 2015 Amendment, this would correspond to Section 17(1)(ii) (a) & (c) in the case of the Arbitral Tribunal and held that this power was traceable to Order XXXIX Rule 7(1)(a) and (b) of the C.P.C. empowering Civil Courts to appoint a Commissioner to seize the hypothecated asset. The L& T Finance case has authoritatively laid down that the principles under these provisions in the Code can be taken as guidelines for the proper and fair exercise of powers conferred by Section 9. A fortiori, post the 2015 Amendment, this would apply to an Arbitral Tribunal exercising identical powers under Section 17.

v. While the finance company or Bank may have a contractual right to repossess the asset upon Commission of default by the borrower, it cannot be again said that in many cases mechanical seizure of vehicles, en masse, may lead to substantial injustice. It is common knowledge that in a number of cases the borrowers generate income by putting these vehicles to use. Therefore, it may be worthwhile for the Tribunal to balance equities, in appropriate cases, by allowing the vehicles to operate while at the same time direct that some portion of the income got from plying these vehicles be deposited to the credit of the finance company. The Tribunals are under no obligation to pass orders seizing vehicles mechanically. In a vast majority of these cases, a common sense approach would not only ensure that the finance company is able to realise some portion of the outstanding dues periodically while at the same time enabling the borrower to retain the vehicle to generate income.

vi. The emphasis is that seizure and sale is not a one size fits all approach. In an appropriate case, the Tribunal can resort to the aforesaid procedure instead of sale. While a finance company may have the right to repossess the asset under the terms of the contract, the Court or Tribunal when petitioned for an order of

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seizure is certainly bound to apply its mind to balance the equities and cannot pass orders seizing vehicles for the asking.

vii. In Cholamandalam DBS Finance Limited v. Sudheesh Kumar [MANU/TN/3780/2009 : 2010 1 LW 951], a Division Bench of this Court formulated guidelines that must be followed while entertaining applications for appointment of Advocate Commissioners to seize hypothecated vehicles and report to Court and has observed thus: "The guidelines are:

a) If the pleadings in the affidavit make out that it is just and convenient to grant interim orders, and if, prima facie, the balance of convenience is in favour of the applicant, then an ex parte order appointing an advocate commissioner may be passed, but simultaneously notice shall be ordered to go to the respondent indicating the date of hearing of the application. It is open to the learned counsel for the appellant to get permission of the Court to also serve private notice on the respondents personally at the time when the vehicle is seized. But, an affidavit must be sworn to by the Advocate Commissioner that the person who received the notice was authorised to do so and that it was not given to some third party who was not responsible or who was not authorised to acknowledge any court notice on behalf of the respondents;

b) After the advocate commissioner reports to the Court that the vehicle has been seized, it shall be in the custody of the applicant. This custody is on behalf of the Court, i.e., the applicant will be holding it in custodia legis.

c) Of course, if even after notice, the borrower does not appear or if it appears to the Court that the borrower is deliberately evading notice, then it is open to the applicant to pray for such reliefs as are necessary, which may even include the sale of vehicle and the matter may be heard ex parte and orders passed in exercise of discretion of Court.

d) The application shall not be closed without hearing the other side after notice is served. Before closing the application, the Court shall also ascertain whether the applicant has taken steps to initiate the arbitral proceedings. If the applicant has not done so, then orders shall be passed putting the applicant on terms as laid down in Sundaram Finance's case (cited supra), because section 9

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depends on a close nexus with the initiation of arbitral proceedings;

e) As regards the expenditure incurred for keeping the vehicle in custody, the applicant shall bear it until the respondent is served and appears. After that, the Court shall hear the parties and pass orders.

f) The remuneration for advocate commissioners appointed by this Court shall be commensurate with the work done, since the financiers will shift this burden only on the already beleaguered borrower.

One other advantage in hearing the respondent before the closing of application is the clue that we get from Firm Ashok Traders' case[MANU/SC/0026/2004 : (2004) 3 SCC 155], cited supra, where the Supreme Court encouraged the parties to suggest a solution. If that is really possible, then even at the initial stage, the entire matter will come to a happy resolution. Therefore, it is not only in the interest of natural justice and fairness, but also as a pragmatic measure that we have laid down these guidelines."

Post the 2015 Amendment to Section 17, these guidelines will equally apply to applications before Arbitral Tribunal for appointment of Advocate Commissioner's to seize hypothecated vehicles.

POWER TO ORDER SALE

Flywheel Logistics Solutions Pvt. Ltd. vs. Hinduja Leyland Finance Ltd. and Ors. : MANU/TN/ 5417/2020

i. Section 9(1)(ii)(a) empowers the Court to order the sale of the goods which are the subject matter of the agreement. An identical power is available to the Arbitral Tribunal under Section 17(1)(ii)(a). In L & T Finance Ltd. v. G.G. Granites, MANU/TN/2662/2013 : (2013) 5 LW 714 this Hon'ble Court held that these powers are akin to those granted under Order XXXIX Rule 6 of the Code, and that the principles laid down therein must guide the exercise of power under Section 9. A fortiori, post the

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2015 Amendment these observations would apply equally to Arbitral Tribunals under Section 17.

ii. Order XXXIX Rule 6 the Court may order interim sale of a movable property forming the subject matter of the proceeding or which is attached before judgment. Sale may be ordered where the property is subject to speedy or natural decay [as in the case of perishable goods] or for any other "just and sufficient cause" which may make it desirable to have it sold at once. Before ordering sale, Order XXXIX Rule 8 mandates that the Tribunal must order notice to the other side. This is the norm. Notice cannot be dispensed with save in exceptional cases where the object of the sale would be defeated by the delay involved in ordering notice. But these cases would be few and far between.

iii. The requirement of notice also ensures that the borrower is put on notice about the sale price. The expression "in such manner and on such terms as it thinks fit" occurring in Order XXXIX Rule 6 would show that the power to fix the price and the terms of the sale is with the Court. When an application is made to the Arbitral Tribunal the fixation of the price and the settlement of terms of sale must be done by the Tribunal itself. This function cannot be delegated to the applicant, as a duty is cast on the Tribunal to see that the asset is not being frittered away and is sold for a fair and reasonable value.

iv. It would also be necessary that the disposal of these vehicles be done through public auction. Though most of the companies, nowadays, resort to this method there appears to be no uniform procedure adopted for this purpose. Invitation for participation in public auction ensures transparency and it would ensure that the entire sale process is free from bias or discrimination and beyond reproach. A public auction ensures fair price and maximum return and would ensure that the vehicles are not collusively disposed off for paltry sums thus causing legal injury to the debtor.

ORDERS DIRECTING FURNISHING OF SECURITY

Flywheel Logistics Solutions Pvt. Ltd. vs. Hinduja Leyland Finance Ltd. and Ors.: MANU/TN/ 5417/2020

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Adv - Srinidhi Kabali N

i. The power under Section 9(1)(ii)(b) and Section 17(1)(ii)(b) is analogous to the provisions of Order XXXVIII Rule 5 of the Code. The applicability of the provisions of the Code to an application to furnish security under Section 9(1)(ii)(b) is no longer res-integra. In Nimbus Communications Ltd. v. Board of Control for Cricket in India, MANU/MH/0247/2012 : (2013) 1 Mah LJ 39, the Division Bench of the Bombay High Court, has held as under: "Section 9, specifically provides in sub-clause (d) of clause (ii) for the grant of an interim injunction or the appointment of a receiver. As regards sub-clause (b) of clause (ii) the interim measure of protection is to secure the amount in dispute in the arbitration. The underlying object of Order 38, Rule 5 is to confer upon the Court an enabling power to require a defendant to provide security of an extent and value as may be sufficient to satisfy the decree that may be passed in favour of the plaintiff. The exercise of the power to order that security should be furnished is, however, preconditioned by the requirement of the satisfaction of the Court that the defendant is about to alienate the property or remove it beyond the limits of the Court with an intent to obstruct or delay execution of the decree that may be passed against him. In view of the decisions of the Supreme Court both in Arvind Constructions and Adhunik Steels, it would not be possible to subscribe to the position that the power to grant an interim measure of protection under section 9(ii)(b) is completely independent of the provisions of the Code of Civil Procedure 1908 or that the exercise of that power is untrammelled by the Code. The basic principle which emerges from both the judgments of the Supreme Court is that though the Arbitration and Conciliation Act, 1996 is a special statute, section 9 does not either attach a special condition for the exercise of the power nor does it embody a special form of procedure for the exercise of the power by the Court. The second aspect of the provision which has been noted by the Supreme Court is the concluding part of section 9 under which it has been specified that the Court shall have the same power for making orders as it has for the purpose of and in relation to any proceedings before it."

35. Similar principles can be garnered from the Division Bench decisions of this Hon'ble Court in A-1 Biz Solutions v. Cascade Billing Centre, C.S.S. Corp Private Limited v. Space

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Matrix Design Consultants Private Limited [MANU/TN/4884/2011 : 2012 1 CTC 225] and Sundaram Finance Limited v. M.K. Khunhabdulla [MANU/TN/0280/2014 : 2014 3 CTC 159]. A fortiori, these considerations would now apply equally to applications under Section 17 as well.

ii. In Raman Tech. & Process Engg. Co. v. Solanki Traders, MANU/SC/8119/2007 : (2008) 2 SCC 302, the Supreme Court pointed out the drastic and extraordinary nature of the power under Order 38 Rule 5 and opined thus: 5. The power under Order 38 Rule 5 CPC is a drastic and extraordinary power. Such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilise the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit claim should be discouraged. Instances are not wanting where bloated and doubtful claims are realised by unscrupulous plaintiffs by obtaining orders of attachment before judgment and forcing the defendants for out-of-court settlements under threat of attachment.

6. A defendant is not debarred from dealing with his property merely because a suit is filed or about to be filed against him. Shifting of business from one premises to another premises or removal of machinery to another premises by itself is not a ground for granting attachment before judgment. A plaintiff should show, prima facie, that his claim is bona fide and valid and also satisfy the court that the defendant is about to remove or dispose of the whole or part of his property, with the intention of obstructing or delaying the execution of any decree that may be passed against him, before power is exercised under Order 38 Rule 5 CPC. Courts should also keep in view the principles relating to grant of attachment before judgment. (See Premraj Mundra v. Md. Manech Gazi [MANU/WB/0033/1951 : AIR 1951 Cal 156] for a clear summary of the principles.)"

iii. The power under Section Section 17 (1)(ii)(b) being extraordinary in nature the onus would be on the applicant to

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plead and establish that the requirements of the law are met. In this connection, the judgment of Ratnam, J in N. Pappammal v. L. Chidambaram [MANU/TN/0191/1984 : AIR 1984 Madras 70] is instructive, and reads thus: "6. The essential requirements for invoking the power of court to effect an attachment under O. 38, R. 5(1), C.P.C., are that the Court must be satisfied that the defendant is about to dispose of the whole or any part of his or her property, or the defendant is about to remove the whole or any part of his or her property from the local limits of the jurisdiction of the court and the defendant is intending so to do with a view to cause obstruction or delay the execution of any decree that may be passed against him or her. It is incumbent that the plaintiff should state precisely the grounds on which the belief or apprehensions are entertained that the defendant is likely to dispose of or remove the property. It may even be necessary in some cases to give the source of information and belief. A mere mechanical repetition of the provisions in the Code or the language therein without any basic strata of truth underlying the allegation or vague and general allegations that the defendant is about to dispose of the property or remove it beyond the jurisdiction of the court totally unsupported by particulars would not be sufficient compliance with the first part of O. 38, R. 5(1), C.P.C."

36. Therefore, in the absence of any specificity about the basis for the claimant's belief or apprehension, the Arbitral Tribunal cannot direct the other side to furnish security on the basis of surmises. The applicant must clearly plead and in some cases provide the basis of his source of information or belief that the debtor is attempting to secrete his assets to prevent the execution of the award against him. Furthermore, the amount to be secured must be a definitive sum and cannot include an indeterminate amount like damages as held in Intertoll ICS Cecons O & M Co. Private Limited v. NHAI [MANU/DE/ 0332/2013 : ILR 2013 2 Del 1018].

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BURDEN OF PROOF WHEN ALLEGATION OF DOMINANT POSITION IS MADE

Anil Rishi vs. Gurbaksh Singh: MANU/SC/8133/2006

6. The initial burden of proof would be on the plaintiff in view of Section 101 of the Evidence Act, which reads as under:- Section 101. Burden of proof. - Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

7. In terms of the said provision, the burden of proving the fact rests on the party who substantially asserts the affirmative issues and not the party who denies it.

The said rule may not be universal in its application and there may be exception thereto. The learned trial Court and the High Court proceeded on the basis that the defendant was in a dominating position and there had been a fiduciary relationship between the parties. The appellant in his written statement denied and disputed the said averments made in the plaint.

8. Pleading is not evidence, far less proof. Issues are raised on the basis of the pleadings. The defendant-appellant having not admitted or acknowledged the fiduciary relationship between the parties, indisputably, the relationship between the parties itself would be an issue. The suit will fail if both the parties do not adduce any evidence, in view of Section 102 of the Evidence Act. Thus, ordinarily, the burden of proof would be on the party who asserts the affirmative of the issue and it rests, after evidence is gone into, upon the party against whom, at the time the question arises, judgment would be given, if no further evidence were to be adduced by either side.

9. The fact that the defendant was in a dominant position must, thus, be proved by the plaintiff at the first instance.

TO BE ADDED AND UPDATED FURTHER

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